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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 24763

CARGILL, INC.,

Libelant-Appellee,

—against—

TUG FRANK A. LOWERY and FRANK A. LOWERY,

Claimant-Respondents,

TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC., and BOUCHARD TRANSPORTATION CO., INC.,

Claimant-Respondents-Appellants,

—and—

INLAND SURVEY BUREAU, INC.,

Respondent-Impleaded-Appellee.

APPELLANTS' APPENDIX

JAMES F. DALTON
11 North Pearl Street
Albany, New York

and

KRISEL, BECK & TAYLOR
27 William Street
New York, N. Y.

Proctors for Claimant-Respondents-Appellants

UNITED STATES COURT OF APPEALS
FILED
OCT 4 1957
SECOND CIRCUIT

INDEX TO APPENDIX

	Record Page	Appendix Page
Docket Entries		1a
Excerpts From Testimony	75-239	8a
RESPONDENTS' WITNESSES:		
Volume II		
Alexander H. Schnapp	75-80	8a
Eugene Meyer	316-326	10a
Volume IV		
Marcus Marshall	98-103	20a
Theodore De Mars	108-134	22a
Bert Eisenberg	142-153	32a
Jack Hanisch	154-156	36a
Eugene C. Meyer	182-208	38a
Franklin H. Haber	209-239	41a
LIBELANT'S WITNESS:		
Melville J. Horn	23-89	12a
Findings of Fact and Conclusions of Law in Civil No. 5017	174-175	49a
Opinion of the District Court	176-191	52a
Findings of Fact and Conclusions of Law in Civil No. 5006		68a
Report of Commissioner	200-222	73a

	Record Page	Appendix Page
Memorandum Decision	230-237	90a
Order	238	98a
Final Decree	239-240	100a
Notice of Appeal	241	102a

Docket Entries

Civil 5017

DATE		
1953		
Oct.	23	Filed Libel
Oct.	23	Filed Stipulation for Libellant's Costs
Oct.	28	Issued Warrant of Arrest—returnable Dec. 7, 1953 at Albany, N.Y.
Nov.	6	Filed Notice of Appearance and Claim of Owner —by Krisel, Beck & Taylor, 27 William St. New York 5, N.Y. and James F. Dalton, 11 N. Pearl St. Albany, N.Y. Proctors for Claimant Respondent Motor Tug Ellen S. Bouchard, Inc. and Bouchard Transportation Co. Inc.
Nov.	6	Filed Stipulation for Value and Costs—
Nov.	9	Filed Writ of Attachment, with return of U. S. Marshal
Dec.	16	Filed Answer of Motor Tug Ellen S. Bouchard, Inc. Respondent, and Claimant of tug Ellen S. Bouchard and Bouchard Transportation Co. Inc.
1954		
Feb.	6	Filed Answer of Respondent-Claimant Frank A. Lowery
Feb.	6	Filed Stipulation for Claimant's or Respondent's Costs
Feb.	6	Filed Claim of Owner Frank A. Lowery
Apr.	10	Filed Stipulation for Value
Apr.	20	Filed Libellant's Note of Issue—June Term—Albany, N.Y.
Apr.	22	Filed Libellant's Notice of Trial

Docket Entries

DATE	
1954	
May 28	Filed Affidavit and Notice of Motion for consolidation of actions, ret. June 7, 1954 at Albany (#5006 and 5185)
June 2	Filed Notice of Motion returnable June 7, 1954—Albany N.Y.; and affidavit (See Civ. 5256, 5006) (See 5185) for order consolidating actions
June 15	Filed Notice of Motion and Affidavit, returnable June 21, 1954—Albany NY—for order to implead Inland Survey Bureau, Inc. as a respondent etc.
June 15	Filed Memorandum-Decision—James T. Foley, D. J. granting certain motions (See 5006-5185-5251-5256)
June 21	Motion to implead Inland Survey Bureau, Inc. as a Respondent Motion granted
June 24	Motion Petition to Implead—Inland Survey Bureau, Inc., Respondent-Impleaded
June 24	Motion and entered Order authorizing leave to file petition to implead Inland Survey Bureau, Inc. as respondent-Impleaded
June 24	Motion Stipulation for Libelant's Costs
July 9	Issued Warrant of Monition—to Implead—returnable Sept. 13, 1954 at Syracuse, N.Y.—S. D. N. Y.
July 16	Filed Warrant of Monition—To Implead—with return of U. S. Marshal served Jul 13, 1954 on Inland Survey Bureau Inc. Miss J. I. McGuire, as Secretary

Docket Entries

DATE		
1954		
Aug.	13	Filed Notice of Appearance of Atkins, Weymar & Randell; and Joseph J. Mailloux—as proctors for respondent-impleaded Inland Survey Bureau, Inc.
Aug.	13	Filed Stipulation for Claimant's or Respondent's Costs
Sept.	13	Trials moved by Plaintiffs' Attys the cases being consolidated for the purpose of trial (See 5006-5185-5251-5256)
Sept.	14	Trial continued
Sept.	15	Trial continued Sept. 16 and 17 Trials continued Decision reserved
Sept.	29	Filed Affidavit and Order to Show Cause returnable Oct. 4, 1954—Albany, N.Y.
Oct.	4	Filed Affidavit in opposition to motion (See 5006-5185-5251-5256)
1955		
Feb.	1	Filed Findings of Fact and Conclusions of Law
Feb.	1	Filed Opinion, Hon. James T. Foley, D. J., granting Libellant Cargill, Inc.—decree in full against the Bouchard interests the libel against Lowery is dismissed and in this Libel the impleading petition of Bouchard against Inland Survey Bureau, Inc. is dismissed (See 5006-5185-5251-5256) The cross libels of Bouchard against the Lowery interests and Cargill, Inc. are dismissed.
Feb.	3	Filed 3 Vols Transcript of Testimony (See 5006-5185-5251-5256)

Docket Entries

DATE	
1955	
Feb. 23	Filed and entered Interlocutory Decree, dismissing libel as to Tug Frank A. Lowery in rem, and Frank A. Lowery in personam; and dismissing impleading petition against Inland Survey Bureau Inc. with costs, against Motor Tug Ellen S. Bouchard, Inc. and Bouchard Transportation Co. Inc. and appointing A. Franklin Mahoney, Attorney at Law, Cannon Bldg. Troy, N.Y. as Commissioner—etc.
Mar. 1	Filed Notice of Appeal from interlocutory decree entered Feb. 23, 1955
Apr. 2	Forwarded record on appeal consisting of original papers to Clerk U. S. C. A.
Apr. 27	Filed Oath of Commissioner A. Franklin Mahoney, Special Commissioner appointed in above matter
1956	
Feb. 28	Filed Bill of Costs taxed at $136.80 in favor of Appellee Cargill, Opinion & certified copy of Judgment U. S. C. A.—that decree of District Court is affirmed on opinion of Judge Foley, with costs taxed in favor of the appellees; & Bill of Costs taxed at $129.87 in favor of appellee Inland
Mar. 19	Filed order that judgment of Court of Appeals for Second Circuit as recited in its mandate be made the judgment of this Court & that interlocutory decree be affirmed, dismissing libel as to Tug Frank A. Lowery in rem; & Frank A. Lowery, in personam, etc. & referring matter to A. Franklin Mahoney, Commissioner, etc.

Docket Entries

DATE		
1957		
Mar.	4	Filed 3 Transcripts of Testimony before Commissioner
Mar.	4	Filed Report of Commissioner A. Franklin Mahoney
Mar.	4	Filed 1 package of exhibits
Mar.	4	Filed Notice of Filing of Commissioner's Report
Mar.	4	Mailed copies of Notice of Filing of Commissioner's Report to Atkins & Weymar, Attys, 70 Pine St. New York 5, N.Y.; & Krisel, Beck & Taylor, Attorneys for Respondents, 27 William St., New York 5, N.Y.
Mar.	8	Filed Exceptions to Report of Commissioner, & Notice of Motion returnable March 18, 1957 at Albany, N.Y.
Mar.	8	Filed Libellants' exceptions to Commissioner's Report & Notice of Motion returnable March 18, 1957 at Albany, N.Y.
June	5	Filed Minutes of Proceedings Apr. 28, 1955—at Albany James T. Foley, J.
June	5	Filed Minutes of Proceedings Mar. 18, 1957—Albany, N.Y. James T. Foley, J.
June	5	Filed Memorandum—Decision—Hon. James T. Foley, D.J.,—; The Report of the Commissioner is modified as indicated herein, & as so modified is confirmed. A final decree in accordance herewith shall be submitted if agreed upon, otherwise settled on three days' notice, etc. Judge Foley

Docket Entries

DATE	
1957	
June 17	Filed Bill of Costs taxed at $35.50 this 17th day of June, 1957
June 17	Filed Bill of Costs taxed at $3461.70 this 17th day of June, 1957
June 17	Filed copy of Bill of Costs U.S.C.A.—Second Circuit & Judgment affirming decree of District Court on opinion of Judge Foley with costs taxed in favor of the appellees
June 17	Filed Bills & Receipts for Transcripts (3) Bills
June 17	Filed Order that certain Exceptions of Libellant are sustained & granted & that all exceptions of Motor Tug Ellen S. Bouchard, Inc. & Bouchard Transportation Co., Inc. Claimant Respondents are denied
June 17	Filed & entered Final Decree that Libellant Cargill, Inc. recover from Tug Ellen S. Bouchard & her claimant & stipulates for value & costs & Bouchard Transportation Co. Inc. & it stipulates for costs, its damages in sum of $75,527.67 with interest thereon from the date of loss Sept. 25, 1953 to the date of this decree amounting to sum of 16,889.22 & costs as taxed in libellant's favor in this Court in sum of 3,461.70 & as taxed in Court of Appeals in the sum of $136.80 making the total sum of $96,015.39 & that libellant have execution therefore & it is further Ordered that respondent-impleaded, Inland Survey Bureau, Inc. recover of & from Motor Tug Ellen S. Bouchard, Inc. & Bouchard Transportation Co., Inc. & their respective

Docket Entries

DATE 1957	
	stipulators for costs, its costs as taxed in this Court in sum of $35.50 & as taxed in Court of Appeals in sum of $129.87 making total of $165.37 & that said respondent-impleaded have execution therefore & it is further Ordered that unless this decree be satisfied, an appeal be taken within 10 days of the service of a copy of this decree with notice of entry thereof on proctors for the claimant-respondents etc. cause the engagements of their stipulations to be fulfilled, etc.
June 17	Entered Judgments as above noted in Decree
June 19	Mailed Notice of entry of Judgments to Atkins, Weymar & Randell; Joseph J. Mailloux; Krisel, Beck & Taylor, Esqs.; Messrs. Foley & Martin; Mr. James F. Dalton, Albany, N.Y.
June 27	Filed Notice of Appeal of claimant respondents, tug Ellen S. Bouchard, Motor Tug Ellen S. Bouchard, Inc. & Bouchard Transportation Co., Inc.—from final decree entered June 17, 1957 etc.

Excerpts From Testimony

Volume II

—75—

* * * * *

ALEXANDER H. SCHNAPP, called as a witness in behalf of Frank A. Lowery, being first duly sworn, testified as follows:

Direct Examination by Mr. Heckman:

* * * * *

—78—

* * * * *

Q. When you examined this vessel was the stern in a square shape? A. Well, when I examined this one, the half of the stern was pushed over, as I said, and of course when you go down she would be square on the bottom.

—79—

Q. And when you say pushed over, over in what direction? A. Towards the bow.

Q. Pushed forward? A. Pushed forward, that's right.

Q. And you have said that part of the stern of the cabin was up as far as Hold No. 4? A. In the middle of hold No. 4, yes.

Q. From what you saw of the condition of the stern, did you form any opinion as to what caused the upper part of the stern to be pushed forward and part of the cabin to be in No. 4 hold?

Mr. Taylor: I object to this, your Honor. I don't know—

The Court: Just a minute. Read the question.

(The Court Reporter repeated the question as above recorded.)

Alexander H. Schnapp—for Frank A. Lowery

Mr. Taylor: It is an opinion as to something that is not susceptible to opinion evidence.

Mr. Heckman: Maybe I can make it easier. I withdraw it.

Q. Did you form an opinion as to whether the vessel had been struck?

Mr. Taylor: I object to that.

A. Yes, sir.

The Court: Overruled.

—80—

Q. And from your examination did you form an opinion as where she was struck? A. Yes, we discussed it.

The Court: What did you say?

The Witness: We discussed it among ourselves.

The Court: I don't care what you discussed. What about your own mind? Did you from your examination in that diving, could you say whether or not it was struck?

The Witness: Yes, sir.

Mr. Taylor: That I object to, your Honor.

The Court: Overruled.

A. Well, obviously it must have been hit very hard because even some of these old barges, they take an awful beating. I mean, I just worked on one yesterday that was in trouble—

* * * * *

Eugene Meyer—for Bouchard

—316—

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EUGENE MEYER, called as a witness in behalf of Bouchard, being first duly sworn, was examined and testified as follows:

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Direct Examination by Mr. Taylor:

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—319—

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Cross Examination by Mr. Heckman:

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—322—

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Cross Examination By Mr. Mason:

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—323—

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Cross Examination by Mr. Atkins:

Q. Mr. Meyer, taking the Marion O'Neill, was her cargo intact? A. Well, I believe some of it had spilled out.

I can't see under water. I could not say.

Q. And the Mae Lowery, was her cargo intact? A. Pretty much so on the Mae Lowery.

Q. And would you say that none had washed away? A. No, I would say that some had washed away.

Mr. Atkins: That is all.

Redirect Examination by Mr. Taylor:

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Eugene Meyer—for Bouchard

—324—

* * * * *

Recross Examination by Mr. Atkins:

* * * * *

Recross Examination by Mr. Heckman:

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—325—

* * * * *

Recross Examination by Mr. Atkins:

Q. Let me ask you this, Mr. Meyer, suppose for the sake of my question that the cargo not only was intact but by super something it was not found damaged. Would that be a factor in the work that you were to perfom? A. No, sir. We had to remove the scow from the channel the best way we could.

Q. You were not out there to perform a salvage operation as such?

—326—

Mr. Taylor: I object to this.

The Court: Overruled.

Were you out there to save the cargo or get that wreck out of the channel?

The Witness: Your Honor, we were there to get that wreck out of the channel.

The Court: That was your main purpose?

The Witness: That was my job.

* * * * *

Melville J. Horn—for Cargill

Volume IV

—23—

MELVILLE J. HORN, called as a witness in behalf of libellant, Cargill, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Atkins:

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—24—

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Q. Now it has heretofore been testified and is in the record upon the examination of one Mr. William Onderdonk that Appleton and Cox, Inc. as attorneys in fact for the interested underwriters or underwriters settled the loss under a customary loan receipt with Cargill, Inc.; • • •

—25—

• • • • •

Q. Now what steps did you take, what did you perform in connection with such service? A. I telephoned to Mr. Hochberg of Millhurst Mills, Freehold, New Jersey and to Mr. Ormsby of the Soybean Products Co. in Oswego and asked both of those gentlemen to proceed immediately to

—26—

Albany and meet one of our men, a Mr. Hylind and make us an offer for the grain.

Q. Who is Mr. Hylind? A. Mr. Hylind is an employee of the Inland Survey Bureau.

Q. And on what date did you do the telephoning that you have referred to? A. Shortly after 9 a. m. September 25th.

Q. Now thereafter did you keep in touch with the situation here in Albany? A. Yes.

Q. By what means? A. Telephone.

Q. And what did you do and what did you ascertain?

Melville J. Horn—for Cargill

A. I requested Ormsby and Hochberg to come to Albany, look over the situation, meet Mr. Hylind and Cargill, Inc. and make an offer for this grain under the water, • • •

—31—

• • • • •

Q. And you did receive reports from Mr. Hylind? A. Yes, and—

Q. (Interrupting) That is enough right there. Now acting on reports that you received from Mr. Hylind what did you do in chronological order? A. On September 26th, the day following, Mr. Hylind telephoned me that Hochberg was on his way, that he had heard from Ormsby's

—32—

representative here on that afternoon, Saturday afternoon. Hochberg confirmed to me over the telephone that he would pay two thousand dollars for the cargo as is and plus one-half of any profits if he made any profits. Later in that day Mr. Ormsby said he would pay two thousand dollars flat, no profits. I told Mr. Hylind to tell this to Mr. Bouchard's surveyors and attorneys which he says he did. Now I am sorry, this is hearsay, Mr. Hylind came back to New York the following day and I have his notes here.

Q. You talked with Mr. Hylind in New York? A. I talked to him and made these notes right there and then and he says—

Mr. Taylor: (Interrupting) Is there any reason why we can't get Mr. Hylind?

The Witness: Yes, beg your pardon, go ahead, yes, we can produce Mr. Hylind.

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Melville J. Horn—for Cargill

—34—

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By Mr. Atkins:

Q. Go ahead. A. We gave Mr. Brennan in Albany and Mr. Westerfeld names of the two people who had made

—35—

offers on the cargo and I think about noon that day we telegraphed to Mr. Brennan, Army Engineer in Albany, that we did not believe it commercially expedient to pursue the matter any further and the two bids as far as any records show did make some offer to the Army Engineers.

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—49—

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Q. Now I hand you a telegram dated September 28th, 1953 and ask you to read the telegram and ask you whether you received that telegram? A. At about ten o'clock in the morning of Monday, September 28 we received a telegram from Millhurst Mills.

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—50—

Q. Will you tell us in general the contents of the telegram.

—51—

Mr. Taylor: I object to the content; I have no objection to his saying what he did after receiving it.

A. (The Witness) What I did was based on what he did, what I did was based on this telegram, one of them.

The Commissioner: Do you know now, Mr. Horn, generally the substance of the telegram?

A. (The Witness) Yes, I knew that morning.

The Commissioner: I will overrule the last objection.

A. (The Witness) He said in substance he was withdrawing the bid of two thousand dollars plus splitting the profits, that was on Monday morning.

By Mr. Atkins:

Q. Following the receipt of the telegram what did you do? A. We gave up and telegraphed Mr. Brennan that we were abandoning it.

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Cross Examination by Mr. Taylor:

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Q. What did you do in the way of hiring equipment to salvage the cargo? A. We discussed the matter with Mr. Connie Ekmark and we come up with a figure around twelve or thirteen thousand dollars which absolutely I know from experience was more than that cargo could be sold for.

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—61—

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Q. What is your recollection of the price of processed wheat—strike that out. Do you know what wheat that had been wet and then dried was selling for in September 1953? A. You might possibly get as much as a feed price for it but I would have no recollection of that.

Melville J. Horn—for Cargill

Q. What was the feed price in September 1953? A. I don't recall.

Q. How can you tell us whether it was worthwhile salvaging these barges? A. After you do it for twenty-five years—

Q. (Interrupting) Please just answer my question, if you don't know what the feed price was in September 1953— A. (Interrupting) Because we estimated that it would cost us not less than $12,000.00.

Q. What I asked you—

> Mr. Atkins: (Interrupting) Wait a minute.
>
> The Witness: (Interrupting) We estimated it wouldn't cost us less than $12,000.00 to get the grain
>
>
>
> out of these barges and that would be wet grain and very wet, it would have lost much of its gluten, which is the real value in wheat. We figured that if we did get it out of the boats wet, we might get ten cents a bushel in its wet condition, but $12,000.00 would be 120,000 bushel.

Q. What was the feed price? A. I don't know but I can find out for you, and to produce—

Q. (Interrupting) You don't know. A. Just a moment please, to mak it into a feed grain—

> The Commissioner: Just a minute, Mr. Horn, will you please confine your answers to answering the question.

A. I can't answer a question from a man who don't know anything about the salvaging of wheat.

Melville J. Horn—for Cargill

By Mr. Taylor:

Q. I don't know a thing about it, I would like to; you answer the question—what was the feed price, what was the price of feed in September 1953? A. Maybe I can help you out, I hope I can.

Mr. Atkins: Well maybe I can help out here, Mr. Brennan the Engineer testified that he received ten cents a bushel.

The Witness: That was wet, that wasn't feed, you had to spend a lot of money to make that into feed.

Mr. Taylor: Where is that testimony, Mr. Atkins?

—63—

Mr. Atkins: It is in the record.

The Witness: Can I answer now, Mr. Taylor?

Mr. Atkins: He asked me a question—on page 58 of Mr. Brennan's testimony.

Mr. Taylor: Thank you.

Mr. Atkins: The question was: "Do you know how much you receive for the cargo?" And his answer was: "I do not recall the exact amount but we sold it after taking competitive bids for about ten cents a bushel, placed by us in purchaser's scow."

Mr. Taylor: Would you repeat the last question.

(The Reporter read back the last question.)

A. (The Witness) I have no record with me.

Q. You don't know what farmers were paying for cattle feed in September 1953? A. I don't recall.

Q. Now of course the price farmers were paying would be entirely different than the Millhurst Company would pay for it? A. No, Millhurst could sell the feed.

Q. They sell it to the farmers? A. Yes, to produce the feed you must dry it.

Q. We could presume they sell it at a profit? A. I hope so, else they couldn't afford to bid us two thousand dollars.

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—80—

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Q. What did you estimate could be removed from these two barges? A. I didn't think we would get more than half of it.

Q. You didn't think you would get more than half? A. No.

Q. You never at any time were in Albany and saw these barges? A. No.

—81—

Q. You relied entirely on what you heard? A. Yes, from these people right here in Albany.

Q. When did you advise the Army Engineers that you were abandoning this cargo in behalf of Cargill?

Mr. Atkins: That is in the record, on September 28th Mr. Brennan testified.

By Mr. Taylor:

Q. When did you decide to abandon the cargo? A. That day, that morning.

Q. Monday morning? A. Yes, after Mr. Hochberg withdrew on us we didn't see much hope.

Q. Did anything happen with Mr. Ormsby's offer? A. No, Ormsby gave us an offer more because he wanted to help us out from previous business, he is in the business and he wanted to keep his hand in.

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Melville J. Horn—for Cargill

Redirect Examination by Mr. Atkins:

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—82—

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Recross Examination by Mr. Taylor:

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—84—

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Redirect Examination by Mr. Atkins:

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—87—

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Recross Examination by Mr. Taylor:

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—89—

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Q. Just one other question, you weren't figuring on selling this stuff as dried wheat, your only— A. (Interrupting) We didn't know if we could see a market, we would have salvaged, we couldn't see a market so we didn't go any further.

Q. Were you figuring on selling only wet wheat? A. Sometimes we would sell if wet if we couldn't dry it.

Q. In this particular instance you figured on wet wheat? A. Yes.

Q. That is the only estimate you were going on? A. Yes, on a wet wheat basis.

Q. You weren't figuring on drying this wheat and selling it as cattle feed? A. No, let the other fellow gamble.

• • • • •

Marcus Marshall—for Respondents

—96—

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Mr. Taylor: I would like to read a very short bit of testimony from the record of the trial, page 323. This is from the testimony of Eugene Myer who was subpoenaed at the trial and he was the derrick boat operator for the Corps of Engineers that raised some of this wheat, and he testified—

Mr. Atkins: What page?

Mr. Taylor: Page 323—on cross examination by Mr. Atkins as follows:

"Question: Mr. Myer, taking the Marion O'Neill

—97—

was her cargo intact?

"Answer: Well, I believe some of it had spilled out, I can't see under water, I could not say.

"Question: And the Mae Lowery, was her cargo intact?

"Answer: Pretty much so on the Mae Lowery.

"Question: And would you say that none had washed away?

"Answer: No, I would say that some had washed away."

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—98—

MARCUS MARSHALL, called as a witness on behalf of the respondents, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Taylor:

Q. Are you connected with Cargill, Inc.? A. Yes, sir.

Q. And in what capacity, Mr. Marshall? A. As operating superintendent of the plant at Albany.

Q. What does this plant generally do? A. Receives and ships grain.

Q. And do you have facilities for drying grain at the plant? A. Yes, we have a dryer.

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—102—

• • • • •

Q. Do you happen to know how much water grain, wheat, of the type we are dealing with here absorbs? A. No, I do not.

Q. Well, is it true that it absorbs 30 per cent moisture and that is all? A. I couldn't say.

Q. You could not say. Did you do anything about salvaging this grain that was sunk in the Marion O'Neill and Mae Lowery? A. Not to my memory, no.

Q. Did anybody so far as you know connected with your plant do anything with respect to salvaging this grain? A. No, not to my knowledge.

Q. How far is your plant from the place that these barges sank? I take it you are familiar with where they sank. A. I am not too familiar with where they sank, but it was somewheres around the bridge, I think.

—103—

Q. One sank about 2200 feet from the bridge; about how far is that from your plant? A. Which way?

Q. South of the bridge. A. I would say it is in the neighborhood of a mile and a mile and a half or two miles, something like that.

• • • • •

Theodore De Mars—for Respondent

—108—

• • • • •

THEODORE DE MARS, called as a witness on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Taylor:

Q. Captain De Mars, what is your business? A. Ship surveyor and appraiser.

Q. And what has been your experience in this business? A. Well, I hold a Master's and Pilot's license of unlimited

—109—

tonnage of steam vessels.

Mr. Atkins: I will concede his qualifications as an expert surveyor, with one exception, as to the grain business.

By Mr. Taylor:

Q. Supposing you tell us your qualifications. A. Well, I served as Master and Pilot of steam vessels under the Department of Commerce, licensed for over 12 years, and I have been a ship's surveyor and appraiser since 1920. I have been engaged in that business over 36 years. During that time I have surveyed damages, appraised vessels, written specifications, supervised repairs on new and old construction. I have appraised all types of vessels. I have salvaged vessels. I have supervised the salvaging of vessels and I have even been a Marine diver.

Q. And have you had occasion to figure the cost of salvaging vessels? A. Yes.

Mr. Atkins: Now, may I ask him a question?

Theodore De Mars—for Respondent

Mr. Taylor: All right.

Mr. Atkins: Have you ever tasted grain?

The Witness: No, I have smelled it, it is not a very nice smell.

—110—

By Mr. Taylor:

Q. Now, will you assume—first of all, have you familiarized yourself with this copy of Bouchard Exhibit 10 showing the location of the sunken vessels Marion O'Neill and Mae Lowery and showing the depth of water in which they were sunk? A. I am familiar with the location, but I am not too certain of the depth.

(Paper handed to witness by counsel.)

A. Well, the depth is 14 feet and 17 feet, soft bottom.

Q. And are you familiar with the Lowery barges, the Warren Clute, the Inez Lowery, the Gabe Heffernan and the Betty L.? A. Yes.

Q. Did you know the Mae Lowery and Marion O'Neill before they were sunk? A. Yes.

Q. Are you familiar with the Frank A. Lowery? A. I am.

Q. Now, will you assume that in the first week of—will you assume that the Marion O'Neill on September 25, 1953 had 18,500 bushels aboard her and that the Mae Lowery had 19,000 bushels, that they were the fifth and sixth barges—or sixth and fifth barges, respectively, together with the four other Lowery barges that I have mentioned in the tow of

—111—

the Frank A. Lowery, and they were sunk in the Hudson River as indicated—where indicated on Libellant's Exhibit 10 in this proceeding, when they were struck by the tow of

the Ellen S. Bouchard and they sank about two twenty a.m. Friday morning September 25, 1953 and that thereafter the tug Clayton P. Kehoe ran upon the Mae Lowery; can you express an opinion with reasonable certainty as to the cost of picking up the grain that was in those two sunken barges and loading it aboard other barges and bringing them to New York?

Mr. Atkins: Now, I am objecting to this on the ground he has not qualified himself as an expert in this respect.

Mr. Taylor: In salvaging cargo?

Mr. Atkins: Salvaging cargo, wheat.

Commissioner Mahoney: I feel that he has. That objection is overruled and the question is addressed to you, do you have an opinion?

The Witness: The answer is Yes to the question.

By Mr. Taylor:

Q. Well, will you give us your opinion as to the cost of salvaging or putting that grain aboard barges and bringing it to New York. A. Salvaging and delivering it at New York, $7,837.

—112—

Mr. Atkins: How many cents?

The Witness: No cents.

By Mr. Taylor:

Q. And how much grain did you estimate would be picked up in this operation? A. About 35,000 bushels.

Q. And how much time would it take to carry out this operation? A. Well, maximum ten days to complete the operation.

Theodore De Mars—for Respondent

Q. Now, if this cargo was brought to the Cargill plant at Albany, how much would it cost for this operation? A. $5,731.

Commissioner Mahoney: Would you give me that figure?

The Witness: $5,731.

By Mr. Taylor:

Q. How long would it take? A. Eight days.

Q. And will you explain how you arrived at your figure and your time? A. Well, the equipment to do this job would have to be brought up from New York. It would require a steam crane or a crane, it don't have to be steam, but I would use steam as the most practical unit, and two barges. Then they would have to be towed from New York without cargo

—113—

to Albany. They would then moor adjacent to the wreck, dig out the grain and put it into the light barges and it would be necessary to put additional pumps on the barges that were receiving the sunken cargo to keep the water out, and all that is included in my estimate. A tug would be standing by during this operation because there would be anchors to run and there would be barges to shift because when one barge is unloaded it would be necessary to shift the crane from that barge to the other and to the wreck in on the beach.

Q. Now, when you say ten days, when do you start that, is that from Friday September 25? A. No, that would start Saturday morning. Friday, it would take the best part of the day to round up your equipment and get your arrangements, your towing arrangements, your crane and your light barges and I would start it on Saturday.

Theodore De Mars—for Respondent

Q. And how soon— A. (Interrupting) And they would arrive here Sunday night.

Q. How soon could you get the cargo to the Cargill grain elevator? A. Then I would expect it to take three days to discharge the two barges into the lighter barges.

Q. That would be Monday, Tuesday and Wednesday?

—114—

A. That is correct.

Q. For picking up the cargo? A. Right.

Q. And by Wednesday night you could have it at Cargill elevator, is that correct? A. While they are digging out the second barge, the first barge would be at Cargill, if they would agree to receive the cargo.

Mr. Taylor: That's all.

Commissioner Mahoney: Do you know what the saturation point of grain is when immersed in water?

The Witness: Approximately 30 per cent.

Commissioner Mahoney: And how long a length of time would grain have to be immersed in water to reach that saturation?

The Witness: I would say 15 to 20 hours.

Commissioner Mahoney: And after 15 or 20 hours, regardless of the length of time it was left there, it would not absorb more than 30 per cent; is that right?

The Witness: That is correct.

Commissioner Mahoney: That's all.

—115—

Cross Examination by Mr. Atkins:

Q. Captain De Mars, for the sake of my cross examination I am going to put you on this salvaging job and I am going to assume that a collision that occurred Friday night,

Friday morning about two a.m., that you were notified—you live in New York? A. Yes.

Q. Now, what is the first thing you would do? A. Answer the telephone.

Q. What would you do after you answered the telephone? A. I would make notes.

Q. And what would you do after making notes? A. Would comply with the recommendations and proceed to accomplish—

Q. (Interrupting) What recommendations? A. We have two boats at Albany, so many tons, we want you to make the necessary arrangements to get them unloaded, get the cargo to New York so it can be sold and reconditioned.

Q. Then who would you go to? A. The first thing I would do, I would engage a crane.

Q. From whom would you engage the crane? A. I wouldn't limit myself to any one, I would call Weeks, Howard and Company or M. J. Rudolph and Company,

they all own whirler cranes.

Q. What arrangements would you make with them? A. If they had a crane available and what rate they would charge.

Q. And what rate would you charge? A. $250. a day.

Q. And who would guarantee the payment of such charges? A. I would, under the orders that I have already received.

Q. Now, would you before doing that come to Albany? A. No.

Q. What would be the basis of your information as to the condition of the barges in the river and the location? A. I wouldn't care about the barges, the barges are sunk and these barges are fitted with wood hatches which are

over the cargo space and then there is canvas tarpaulins over the hatches. Those tarpaulins are secured down to the deck and I know that the cargo would be intact.

Q. How would you know that? A. Because it can't get out as long as the tarpaulins are in place, and it would remain there until it became saturated, then it would lay there.

Q. You would expect it to be saturated? A. I would expect it to be saturated by the time I got up here, yes.

—117—

Q. Now, would you take into consideration anything with reference to the barges apart from the cargo? A. No, I am not concerned about the barge, I am now going to remove cargo from both damaged barges and I would assume nothing about the barges Mae Lowery and Marion O'Neill, that if they were hit sufficient to sink them that they wouldn't have sufficient value to warrant repairing.

Q. What would you do with the barges? A. I would moor them, I would get them to the beach at high tide.

Q. And what beach would you get them to? A. Anywhere at all.

Q. Where? A. In the Hudson River in the vicinity of Albany.

Q. What beach would you take them to? A. It isn't difficult to beach barges within five miles above or below, there is plenty of land where you can get barges into shore and secure them to a tree, if necessary, with cable so it will not become a menace to navigation.

Q. And in your computation did you take into consideration the cost of the removal of the barges, in your computation in answer to Mr. Taylor's question? A. I would say I did.

—118—

Q. Well, I mean, did you? A. I would say I did.

Q. How much did you take? A. I am keeping the tug by all the time to take care of the barge when it becomes discharged, take care of the barge—in other words, during the three days we have nothing for that tug to do but to assist the crane, move the crane when the one barge is loaded, when the one barge is loaded to move it to a mooring that it will be floating next to when it is cleaned out, and it can be towed to shore. These are wood boats and they will float and you will get a line out to a tree.

Q. By that time would you have removed all of the grain from both the barges? A. No, up to this point—

Q. (Interrupting) You mean some grain in some of the barges? A. Up to this point I would only have one barge, would be working on one barge at a time. We haven't touched the second barge yet. I would remove practically all the grain in the barge.

Q. How long would it take you to get one barge unloaded? A. I would say a day and a half work maximum allowance for removing the grain out of each barge.

Q. And you would do one barge at a time? A. Yes, you

can't disturb two boats that are firmly secured—

Q. (Interrupting) Would you—

Mr. Taylor: Let him finish.

The Witness: I can't touch the second one until you have the first one secured.

By Mr. Atkins:

Q. And would you take into consideration that the barge you were not working on was a menace to navigation? A. No, I wouldn't take that into consideration, that isn't my responsibility. I would expect that after these boats were

sunk that a prudent owner would make all the necessary arrangements to mark that sunken vessel, that is his duty as an owner.

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—131—

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By Mr. Atkins:

Q. Now, I want you to give me item for item your computation of costs in this salvage? A. Delivered at New York?

Mr. Taylor: At Albany?

Mr. Atkins: Both.

—132—

The Witness: This is my computation in salvaging the cargo and delivering it at New York. Crane hire, 8 days, at $250. per day, $2,000. Services of diver, three days, $125. per day, $375.

By Mr. Atkins:

Q. How much a day? A. $125.

Commissioner Mahoney: What was the figure for the crane?

The Witness: $2,000., $250. a day. Barge hire, ten days—

Mr. Atkins: What was the total on the diver?

The Witness: $375. Two barges to take the cargoes, that would be ten days each at $40. per day, $800. The services of a pump, the barge that is receiving the wet cargo would contain a lot of water, as it drained out, it needed extra pumps, we have pump hire for ten days at $30. per day, $300. Now, to go —trucking pump to and from, $40.

Theodore De Mars—for Respondent

Commissioner Mahoney: A day?
The Witness: No, $20. each way.

By Mr. Atkins:

Q. From where to where? A. Wherever the barge is,

—133—

and then off. This estimate is New York. Towing New York to Albany 27 hours one location for a flotilla, that is, tug standing by and attending crane in the salvage operations 72 hours. That should total 134 hours at $33. per hour.

Q. How much? A. $4422.

Q. What other items? A. That completes the items on New York delivery, and the totals are $7,837.

Q. And now the item of parking the wrecks. A. No, the tug that is standing by, that is, 72 hours, will move the wrecks to the location.

Q. You didn't take that into consideration? A. It is in the tug time?

Q. You're under oath, did you take that into consideration when you made that up? A. Yes, I know I cannot unload a wooden hull and let it drift around in the river, that is why I had a tug standing by and when the crane will be anchored, that will be fixed, but there must be a tug standing by to take this unruly boat, we will call it, the boat that becomes light and is apt to become a menace to navigation, so the tug takes him in charge and he will stay and secure him at some location. He may go to a pier in the neighborhood, put out a line or cable, and he may come back to another location;

—134—

in other words, anything to expedite because he wouldn't want to spend too much time beaching that wreck because he has got to go out and get the crane and shift that up to the other wreck, then when the crane starts on the other

job, then he can come back and dispose of his wreck; the only operation is tug and cable.

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—142—

BERT EISENBERG, called as a witness on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Taylor:

Q. What is your business, Mr. Eisenberg? A. Manufacturing and selling animal feeds, ingredients.

Q. And what experience have you had in this business? A. Well, the length of time?

Q. Yes. A. About 8 years.

Q. And do you deal in all sorts of damaged food products including grain? A. That is our business, to buy damaged and salvaged material that can't be used for human consumption.

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—143—

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By Mr. Taylor:

Q. Now, Mr. Eisenberg, will you assume that in the first week of October 1953 you had available in New York a quantity of about 35,000 bushels of wheat on barges which had been recovered—of wheat that had been recovered from two barges that had been sunk in Albany, New York on the early morning of September 25, and which was removed from the sunken barges on September 28th, 29th and 30th and was available in New York on the early morning of Friday October 2nd, I believe that is, 1953, and that the original wheat which was a quantity of 37,500 bushels

of which 18,500 was No. 3 red winter wheat and 19,000 was No. 1 red winter wheat, and that about 35,000 bushels had been recovered; can you give an opinion with reasonable

—144—

certainty as to the value of this cargo in New York after it had been dried?

Mr. Atkins: After it had been dried?

Mr. Taylor: Yes.

The Witness: October 1953?

By Mr. Taylor:

Q. Yes, 35,000 bushels. A. Let's see, now.

Q. Do you want to convert that into tons? A. I can give it per ton—well, 300 bushels—

Q. (Interrupting) Give it to us either as a price per bushel or ton. A. I will give it per ton, because we buy the damaged material, we have to turn it into tons, we don't sell it by bushels.

Mr. Atkins: It takes more than 300 bushels to make a ton.

By Mr. Taylor:

Q. Can you give us your opinion as to the value of this cargo after it has been dried? A. As to the value that I would offer for salvor, as to the retail value?

Q. As to the retail value of this cargo. A. I would say in October 1953 somewhere between fifty-five and sixty dollars per ton.

Q. How much would it cost to recondition that cargo,

—145—

these 35,000 bushels, can you give us that on a ton basis? A. You mean taking it out of the tug and reconditioning it.

Q. Taking it out of the barges and drying it and having it ready for sale. A. There is one place in Brooklyn you can have it done for about twenty-five cents a bushel, and I think—I am sure that the Central charges twenty-three cents per bushel, and if we were to do it in our plant it would be cheaper because I wouldn't be paying the profit I would to these people to dry, we would be able to do it in the neighborhood of eighteen cents per bushel.

Q. To recondition it? A. To make it usable for animal feeds only I am talking about now.

Q. Can you convert that into how much per ton?

(Discussion off the record.)

Q. Will you tell us how much you figure that it would cost to recondition this cargo per ton? You have already said it would cost eighteen cents per bushel to dry, and how much is that per ton? A. Eighteen cents a bushel?

Q. Yes. A. About four to five dollars a ton.

Q. Now, when you say four to five dollars a ton, are you

—146—

you figuring the cost it would be in your own plant? A. Yes.

Q. Do you know what the—withdraw that. Now, how much moisture would you have to take out of this wheat to make it saleable?

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—147—

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A. That depends on the original amount of moisture that would be in the wheat, which runs about an average from eleven and a half to thirteen per cent in good wheat before it is damaged, and assuming that it will absorb up to 3(

per cent moisture after it is immersed in moisture, we have to take out the difference, which would be 16 to 17 per cent.

Mr. Taylor: I want to state for the record at this time that the stipulation marked Libellant's Exhibit 1, indicates that the moisture contained in the 18,500 bushels was 13 per cent; and that the 19,000 bushels contained—of No. 1 red winter wheat, contained 12.6 per cent of moisture.

By Mr. Taylor:

Q. You say that the reconditioned wheat could be sold at about sixty dollars a ton? A. In the neighborhood of that, I think I said from fifty-five to sixty dollars, depending on the market at the time and demand and so forth, but that would be the price, because brewers grain at that time I

—148—

know definitely was selling at $57. a ton, that is comparable, but not as good as this, brewers wet grain dried.

Q. Will you explain to us a little bit what brewers grain is? A. You get the wet grain from a brewery and, of course, they take it to a drying plant and take out the moisture. It contains almost 60 to 70 per cent moisture. In other words, you get one ton for four tons when it is dry. That has a market value, it varies, $55. f.o.b. Brooklyn, depending whether it's plentiful or whether there's a shortage in the market, $57.

Q. How does this reconditioned No. 3 red winter wheat and No. 1 red winter wheat compare with brewers dried grain? A. As to price it is comparable, this wheat would be a little better. It is comparable if it is dried—if it is dried properly it would be better.

Mr. Taylor: That's all I have.

Jack Hanisch—for Respondent

Cross Examination by Mr. Atkins:

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—153—

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Commissioner Mahoney: Just a moment, Mr. Eisenberg, this figure of fifty-five to sixty dollars per ton, that is the resale figure of the grain?

The Witness: Yes.

Commissioner Mahoney: That you would resell it at?

The Witness: Yes.

Commissioner Mahoney: That is not the figure you would buy it at?

The Witness: No, sir.

Commissioner Mahoney: And in that figure there would be what it would cost your firm to recondition the grain?

The Witness: Yes, sir.

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—154—

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JACK HANISCH, called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Taylor:

Q. Mr. Hanisch, what business have you been engaged in? A. In the hay, grain and feed business.

Q. And how long have you been in that business? A. This business was established in 1923, and I have been actively engaged since 1934.

Jack Hanisch—for Respondent

Q. Have you been a buyer of grain in good condition and bad condition? A. Yes, sir.

Q. Both as a user and a seller? A. Both as a user and seller.

Q. What has been—what occasion have you had to buy grain as a user?

Mr. Atkins: Don't you think you ought to ask

where he lives? I would like to know that.

By Mr. Taylor:

Q. Would you give your address? A. 20 Wavecrest Drive, Islip, Long Island.

Q. Would the reporter read back the last question?

(The Reporter read back the previous question as above recorded.)

A. Well, I have a dairy farm in addition to the hay, grain and feed business, and I produce wholesale milk.

Q. And how many head of cattle do you have? A. Well, we keep a regular herd of 60, and lately are down to 40.

Q. Now, would you assume that during the first week of October you had available in New York a cargo of 35,000 bushels of wheat on barges, in New York, which had been removed from two barges that had been sunk in Albany, New York on the early morning of September 25, and that this sunken wheat consisted originally of 37,500 bushels, 18,500 of which was No. 3 red winter wheat and 19,000 bushels was No. 1 red winter wheat, and that this cargo was available to you in New York

on or about October 2, 1953; can you give an opinion with reasonable certainty as to the value of this cargo in New York in October 1953? A. I—

Mr. Atkins: I am going to object to it unless you

—136—

put in where in New York.

By Mr. Taylor:

Q. Will you also assume that this cargo had been dried and reconditioned? A. In other words, picked up at the plant, the price picked up at the plant?

Q. Yes, can you give us an opinion as to its value? A. Yes, I can.

Q. What is that opinion? A. To me, the wheat dried and processed as you said, would be worth anywhere from fifty-five to figty-eight dollars per ton.

Q. Have you dealt in other types of reconditioned grains? A. Yes, at one time or another.

Q. Have you dealt in brewers dry grains and brewers wet grains? A. Absolutely, that is the bulk of my business.

Q. How do those feed grains compare in value to this cargo that we are talking about after it has been dried? A. I would say that it was of the same value or better for feeding purposes, for animal feed purposes.

Mr. Taylor: That's all.

—182—

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Eugene C. Meyer, called as a witness in behalf of the Claimant-Respondents, Bouchard, being first duly sworn, was examined and testified as follows:

Eugene C. Meyer—for Bouchard

Direct Examination by Mr. Taylor:

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—187—

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Cross Examination by Mr. Atkins:

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—195—

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Q. Would you mind describing the visual appearance of the wheat as it came out of the respective barges—I mean when you put the wheat into the dump scows? A. Well, of course, all the wheat was swelled and most of it came out fairly clean on the O'NEILL, which was the upstream scow. There was quite a lot of broken wood and so forth

—196—

especially on the stern end. Most of the wheat was in fairly clean condition when we brought it up.

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Redirect Examination by Mr. Taylor:

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Q. Did you put—the wheat that was disposed of, was that put on the buyer's barge or on one of your barges? Do you happen to recall? A. What do you mean by disposed of?

—201—

Q. The wheat that was bought by— A. You mean after it was sold.

Eugene C. Meyer—for Bouchard

Q. The wheat that was sold, on whose barges was that put? A. I believe that was one of Cargill's barges, I believe. I suppose the company hired it or rented it.

Q. In any event it was not a Government barge? A. No.

Q. What did you do, take that wheat off your dump barges and put it on those other barges? A. No.

Q. How did you do that? A. Our own dump barges, the wheat that was loaded in our barges was taken down the river and taken to the dump area.

Q. And the wheat that was sold? A. Was put right into the barges that was alongside.

Q. That did not belong to the Army Engineers? A. That's right.

Mr. Taylor: That is all I have.

Recross Examination by Mr. Atkins:

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—208—

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Mr. Taylor: Mr. Meyer, did you once say that this cargo came out of these barges "in a golden stream"?

The Witness: I would say, as I said before, the upper scow, which was considerably damaged in the rear, when I dredged, I brought up a lot of pieces of wood and the cabin, and one thing and another, but the general condition of the wheat was fairly clean, and especially in the second scow, it was not damaged so heavily. The wheat came up nice and clean.

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Franklin H. Haber—for Respondent

—209—

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FRANKLIN H. HABER, called as a witness in behalf of the Respondent, being first duly sworn, was examined and testified as follows:

The Commissioner: Give your full name to the Court Reporter, please.

The Witness: Franklin H. Haber.

Direct Examination by Mr. Taylor:

Q. Mr. Haber, what is your connection with the Army Engineers? A. Chief of Operations.

Q. Are you the Assistant in Charge here in Albany? A. That's right.

Q. Mr. Brennan, as I understand, is not here today? A. He is home sick.

Q. Now, from your records, are these the records that you have before you kept in the regular course of the operations of your office? A. This is our office file of

—210—

records.

Mr. Atkins: I won't object on any ground that they are not any evidence of official documents. I will concede that.

The Commissioner: I will consider the foundation for these records has been laid.

By Mr. Taylor:

Q. From your records can you tell us how much wheat was taken out of these two barges? A. I have a little note here that I made when you called me on the telephone.

Franklin H. Haber—for Respondent

It is in the file on the questions you asked me, how much grain was removed and the answer is 29,555 bushels.

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—212—

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Cross Examination by Mr. Atkins:

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—213—

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Q. Do your records, Mr. Haber, show that the barges MARION O'NEILL and MAE LOWERY were abandoned by the owner to the Government? A. Yes, sir.

Q. Do they show the date of the abandonment? A. Yes, sir.

Q. And can you give us the date? A. Here is a copy of a telegram reading "I, as owner of the barges MARION O'NEILL and MAE LOWERY sunk at the Dunn Memorial Bridge in the Hudson River, hereby notify you of the abandonment thereof."

Q. And the date? A. It is dated 28 of September 1953.

—214—

Q. Do your records show whether your office advised Inland Survey Bureau, Inc. of Mr. Hyland—Hylan, I guess it is, that any contemplated salvage operations with respect to cargo must be commenced by a certain date? A. I have to look through the file here. I have a copy of a telegram here I believe which answers your question. Dated September 28, 1953 from Inland Survey Bureau, Inc., 111 John Street, New York 38. And it is addressed to Ambrose F. Brennan, Engineer in Charge, United States Army Engineers, Room 322, Federal Building, Albany, New York: "Re barges MARION O'NEILL and

Franklin H. Haber—for Respondent

MAE LOWERY sunk Albany, based on our investigation we have concluded that it is not commercially expedient to enter upon any salvage operation with respect to the cargoes in each of the barges and, therefore, on authority of cargo underwriters we are taking no further steps to enter upon any damage salvage operation with respect to those cargoes. Many thanks for your fine cooperation and fine consideration. Inland Survey Bureau, Inc."

Q. Now, do your files show the date, if any, that the Army Engineers determined to clear the channel of the wrecks, that is to remove the wrecks? A. I have nothing on determination, but I have a note here that operations

—215—

on the barge MARION O'NEILL commenced 29 September 1953; completed on 3rd of October 1953 and barge moved out of channel to east shore of river 4th of October, 1953.

Q. What barge is that? A. MARION O'NEILL.

Q. Have you anything on the MAE LOWERY? A. Operations on MAE LOWERY commenced 5 of October; complete 8 of October; barge moved out of channel to east shore of river October 9, 1953.

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—219—

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The Commissioner: Just the amount of the three separate bids.

The Witness: Yes. One has "our check $380 reduction 10 per cent deposit," ten cents was the bid. This one is ten and total quantity 19,000 wheat bushels. This one is from Universal Grain Company regarding 2145 based on 19,000 bushels loaded on

scows furnished by us—2150 and four-tenths cubic bushels. You are to advise us if we are the successful bidder and we will send you a certified check.

The Commissioner: What was the amount of their bid?

—220—

The Witness: $2,945, based on 19,000 bushels.

By Mr. Atkins:

Q. Twenty-nine cents? A. $2,945.

Q. $2,945. And to whom did you sell? A. Universal Grain.

Q. You accepted the bid of Universal Grain? A. Universal Grain Company.

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—221—

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Q. Now, the purpose of removing the barges was to clear the channel? A. That's right.

Q. For navigation; is that not correct? A. That is correct.

Q. Now, the Government undertakes to do that at its own cost; is that not correct, when the craft involved are abandoned to the Government? A. Depends on the circumstance. In this particular case it was an emergency and it had to be done immediately, and we started operations the next day. In the case of some abandoned vessels and they are located in such a position that they are not obstructing navigation, immediate navigation, they are sometimes let out at bids.

Q. But in a case like this, where you consider them a menace to navigation, you undertake the work and did in this case? A. That is correct.

Franklin H. Haber—for Respondent

—222—

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—223—

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Redirect Examination by Mr. Taylor:

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—227—

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Q. Now, who were these bids from again? Start with the first one. A. Cargo Recovery Corporation.

Q. Who is that signed by? A. Allen B. Clegg.

Q. May I see that? A. (Hands document to counsel.)

Q. And who signs as president of Cargo? A. Stewart D. Ormsby, President, and it is signed Allen B. Clegg.

Q. Do you know whether that is the same Mr. Ormsby—strike that out. Where is this from? A. Cargo Recovery Corporation, East Seneca St., Oswego, New York.

Q. And Mr. Ormsby signs himself as President of that

—228—

corporation? A. He is so listed.

Q. Now, you have one from Millhurst Mills? A. Yes, sir.

Q. Who signs as principal of that company, if it appears? A. No signature.

Q. I think the record is already clear that Millharst Mills was one of the two people that Mr. Horn asked for a bid for this wheat. Do you have any information as to Millhurst Mills—strike that—who Universal Grain is? A. I have a telegram from Universal Grain Company, also the third bid.

Q. Were you here, Mr. Haber, when the—strike that out. Did you at any time over that weekend, when this casualty occurred, that is after September 25, have any

conversations with a representative of the Universal Grain who was here in Albany at that time; do you recollect? A. I don't remember.

Q. Now, is it fair to say that all these people from whom you got the bids, all of them were here in Albany before the time that these bids went out? A. I wouldn't know.

Q. Well, they would obviously have to be.

—229—

Mr. Atkins: Well, I object to it.

A. They did business with Mr. Brennan, not with me.

Q. With Mr. Brennan. As far as you know, nobody else got notice of this sale? A. As far as I know.

Q. And as far as you know, these people were also familiar with the situation before they made these bids? A. They were, obviously.

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—230—

Recross Examination by Mr. Atkins:

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—235—

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Re-Redirect Examination by Mr. Taylor:

Q. Mr. Haber, just one thing. Are you familiar with the accounting practices of the Army Engineers? A. To a certain extent.

Q. Isn't it their practice to charge a certain amount of the office overhead on every operation? A. To every operation?

Q. Yes. A. Not to every operation.

—236—

Q. Well, wouldn't a certain amount of office overhead be charged to this operation? A. Probably would be.

Franklin H. Haber—for Respondent

Q. And would that be this office, the New York office? A. There is a field office overhead and district office overhead which would be put on the charge.

Q. And part of that would be charged to this operation? A. Probably would be, yes, sir.

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—237—

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Q. These barges didn't necessarily have to be broken up; did they? A. The method of disposal is entirely up to the contractor, subject to our approval.

Q. And where did he have to take them, in accordance with your request? A. He didn't have to take them anywhere, but got permission to use Sturtes Island.

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—238—

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Q. Do you know how far away that is from here, Mr. Haber? A. I would say it is about the same distance, three or four miles.

Q. Do you know how many other contractors put in bids? A. Yes, sir.

Q. How many? A. They are in the records here. There were three bidders.

Q. And when were the barges removed? A. You mean the completion date?

Q. The date they were removed by the contractor, if you have it there. A. Date of completion of work, 8 of January, 1954.

Q. And when did the work start? A. Date of commencement of work 30 November, 1953.

Franklin H. Haber—for Respondent

Q. And where were the barges between October 9 and November 30th? A. East shore of the River.

Q. They were just there at the shore from the time they were discharged of the wheat until the time that they were removed by this contractor on November 30?

—239—

A. From the time he removed them to the east shore until the time the contractor started work, they were still tied up there.

Mr. Taylor: That is all.

Re-Recross Examination by Mr. Atkins:

Q. Will you just state for the record the name and the amounts of the other bidders? A. Yes, sir. The following bids were received and opened on two p.m. eastern standard time 23 October, 1953. Bidder Merritt Chapman and Scott Corp., amount $9,774; R. J. Campbell $8,200.

Q. Is he from Canada? A. R. J. Campbell. I assume he is from New York.

Q. How much was that? A. $8,200. Island Marine Contracting Corp. $7,771.

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Findings of Fact and Conclusions of Law in Civil No. 5017

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 5017

CARGILL, INC.,

—against—

Tug FRANK A. LOWERY and FRANK A. LOWERY, Tug ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. and BOUCHARD TRANSPORTATION CO. INC.,

Claimants-Respondents.

HON. JAMES T. FOLEY, *D.J.*

FINDINGS OF FACT

1. Libellant was and is a Delaware corporation, with its principal office and place of business in Minneapolis, Minnesota, and also an office and grain elevators at the Port of Albany, New York.

2. On or about September 14, 1953, its subsidiary, acting in its behalf, Cargo Carriers, Inc., entered into agreement with Frank A. Lowery for the purpose of the carriage of grain on the Lowery tug and certain barges for transport from Buffalo to Albany. The carriage was subject, among others, to the terms and provisions of the New York Produce Exchange Charter Party, No. 1, as Amended. (Car-

gill Exhibit 2). The Libellant was the owner of the grain loaded on the tug Frank A. Lowery and the six barges which were involved in the collision with tug Ellen S. Bouchard and its push-tow, Barge B-90, on the morning of September 25, 1953.

3. I now adopt and confirm as though made herein, Findings of Fact 1, 2, 3, 4, 5 and 6 made in the libel Frank A. Lowery against Tug Ellen S. Bouchard, et al., Civil No. 5006 and filed as of this same date.

4. Under the carriage and charter contract, Lowery was not responsible for damage arising from collision unless caused by its negligence. Libellant, Cargill, Inc. performed all the conditions of the contract on its part to be performed.

5. Inland Survey Bureau, Inc. made its inspection as the agent of certain marine underwriters and not as agent for Cargill, Inc. Inland made careful survey for its client and did not act fraudulently towards its principals. The vessels it inspected were fit and seaworthy for their planned voyage and their condition did not cause or contribute to the happening of the collision or the sinkings and damage.

CONCLUSIONS OF LAW

1. The alleged loss and damage to the cargo of grain was caused solely by the fault of respondent, the Bouchard interests, and without any fault or carelessness on the part of the Lowery interests.

2. Under the contract of carriage, the Lowery interests "shall not be liable for losses caused * * * by collision, ex-

cept where caused by their negligence or fault." Lowery is not responsible for the collision and therefore the alleged loss of Cargill, Inc. resulting from such collision.

3. Inland Survey Bureau, Inc. was not an agent of Cargill, Inc. There was no privity except between marine underwriters and Inland. The inspection reports, made as an ordinary, business practice, were not fraudulent or negligently made. The condition of the vessels did not cause or contribute to the collision, sinking and damage.

4. The Libellant is entitled to a decree in full in its favor against the Bouchard interests. The impleading petition against Inland Survey Bureau, Inc. is dismissed as insufficient in law and fact.

JAMES T. FOLEY
United States District Judge

Dated: Albany, N. Y.
January 31, 1955

—176—

Opinion of the District Court

HON. JAMES T. FOLEY, *D.J.*

This array of admiralty suits arises from a collision in the Hudson River at a point adjacent to the south end of the City of Albany. Four of the suits involve the original collision and the sinking of two barges and damage to others; the fifth suit is based upon the aftermath of such collision resulting in the running upon one of the sunken barges by the tug, Clayton P. Kehoe. The cases were tried together by the court. Although it is not an easy task, I shall endeavor to discuss them together.

Complexity entered the trial, and now the disposition of the issues, because of the unusual position and theory of defenses, impleader and cross libels advanced by the Bouchard interests at the trial and in their briefs. Also, the ordinary divergence and contradiction in the testimony which seem to be the pattern in collision cases, whether on the highways or waters, is present to an extreme degree. Some of the unseemly conflict in eye-witness versions as to distances is treated in accord with the philosophical comment in The Detroiter, 2 Cir. 82 F. 2d 234: "The thing happened at night, when estimates of distance, proverbially unreliable at any time, are especially illusory." Despite such difficulties, it is clear that the dominant issue for decision throughout is the responsibility for the first collision. Such issue marks the main course and the extent of the voyage into novel and uncertain channels shall depend greatly upon the disposition of this problem. This determination, as always, must be based upon the facts developed on the trial by testimony, depositions and exhibits, as I find they preponderate to one side or the other, and the

—177—

definite law applicable, if such exists, to the particular factual situations involved.

To give some sense to the discussion and to limit the confusion engendered at least in my mind by the presence of an impleaded respondent, the Inland Survey Bureau, Inc., in the Cargill libel, and the voluminous cross libels by the Bouchard interests back against the libellants, Frank A. Lowery and Cargill, Inc., it may be well to summarize generally certain facts and events together with the circumstances surrounding the collision. Such recital should clarify to some extent the basis for the involved procedures and contentions that enter the picture.

The Lowery flotilla, ordinarily made up as at the time of the collision, sailed the waters of the Hudson River and Barge Canal for a considerable number of years. It was old in the service of carrying cargo, well known to the trade and canal and river people, and on many occasions it carried scrap iron west from New York City to Buffalo, and grain east from the terminal at Buffalo to the City of Albany. The "steamer", Motor/Vessel Frank A. Lowery, was a converted wooden barge itself, carried cargo and pulled its tow of wooden barges tandem-style behind by hawsers keeping the tow close up, each bow to stern. It was an established custom and practice over the years for the protection of the charterers and the insurance underwriters of cargo, to inspect all the vessels of the Lowery flotilla at the beginning of each trip and after the discharge of cargo at the destination. Many of these detailed reports, described as on-hire and off-hire inspection reports, and particularly those made in reference to the carriage of scrap iron, are introduced by Bouchard to disclose such extraordinary weakness, in-

firmity, old age and disrepair as to warrant the inference and conclusion that such conditions caused, or contributed to the cause of the collision on September 25, 1953, in the

river at Albany, or at least contributed to the sinking of the two barges and damage to the other barges and cargo.

Specifically, Inland Survey Bureau, Inc. is on the scene as an impleaded respondent, brought in by Bouchard in the Cargill libel, because in early September it inspected the Lowery flotilla for its client, certain insurance writers, for the carriage of Cargill grain from Buffalo to its grain elevator in the Port of Albany. At first Inland disapproved the vessels as unfit for the carriage of grain, but after repairs were made by Lowery himself and crew to the inner lining of the barges, the vessels were approved, the grain was loaded and the Lowery fleet came through the canal and down the river to the place of its misfortune.

The Lowery flotilla on the early morning of September 25, 1953, cleared the Dunn Memorial Bridge at Albany with six wooden barges in tow. The fifth barge was the Mae Lowery. The sixth barge was the Marion O'Neill. The river and channel at or near this point has substantial expanse, and the Dunn Memorial Bridge under which the tow passed is a main artery for automobile and truck traffic from the Albany side of the river to the Rensselaer or east side of the river. The destination of the flotilla, the Cargill grain elevators at the Port of Albany, is but a short distance beyond the bridge on the west bank of the Hudson River. Proceeding downriver behind the Lowery fleet came the tug Ellen S. Bouchard, pushing in tow the steel barge B-90. Its destination was an oil dock on the east side of the river on the Rensselaer side, in the near vicinity of the collision. At a point 800 to 1100 feet beyond the Dunn

—179—

Bridge, the Bouchard tow struck the stern of the barge Marion O'Neill, which sank almost immediately. The time was 2:20 A.M. Eastern Daylight Time. Within a range of

ten to fifteen minutes, despite some effort on the part of her captain to pump her, the Mae Lowery also sank. At about 4:00 A.M. the tug Clayton P. Kehoe came down the river from a dock in the City of Albany and ran upon the wreck of the Mae Lowery.

From this background came the five suits. First, Frank A. Lowery, the owner of the Lowery flotilla, sues the tug Bouchard and the Bouchard interests for the loss of the two barges, Marion O'Neill and Mae Lowery, and damage to other barges, as a result of the collision. Second Cargili, Inc. sues both the Lowery and Bouchard interests for the loss of the grain carried in the sunken barges with an indefinite claim for damage to grain carried in the surviving barges. It is in this action that Bouchard impleads Inland Survey Bureau, Inc., on the alleged ground that Inland is liable to Cargill, Inc. (which did not sue Inland) for negligent inspection of the Lowery fleet and its approval of the fleet for transport when allegedly it was not fit and able to transport safely. It is their contentions that Inland acted as the agent for Cargill in making the inspection, that Cargill should be charged with the knowledge of the agent that the Lowery was unable to control her tow, and finally, for these reasons, Cargill, Inc. may be charged with fault for the collision. In its brief, Bouchard is gracious enough to state: "It is of little moment to Bouchard, under the circumstances, whether Cargill collects from Inland or not." The third suit is termed a protective cross libel by the Bouchard interests against the Lowery interests for indemnity and contribution in the event of any recovery

by Cargill, Inc. against Bouchard. There is no claim of damage for the barge B-90 or the tug Ellen S. Bouchard. Then, to balance out things evenly, and possibly square away the entire situation, the fourth suit is another pro-

tective cross libel by Bouchard against Cargill, Inc. for indemnity and contribution in the event of recovery by Lowery against Bouchard. The fifth suit is a simple, understandable one by the owner of the tug Kehoe against the tugs Bouchard and Lowery, and Lowery personally, for the damage the tug sustained.

*The Collision Issue**

This issue is clearly the crucial one. I have little difficulty, from a review of the evidence, to place the responsibility for the collision upon the tug Ellen S. Bouchard. Despite the conflicting testimony, the credible evidence establishes to my judgment that the situation was plainly and simply an overtaking one with a complete lack of due care and caution in the navigation and maneuvering of the tug Bouchard and the push tow, Barge B-90.

The excellent photographs in evidence (Bouchard Exhibits 22a-h, Lowery Exhibits 6, 7a-b, 8a-b) show that the place of the accident was at a substantial span of river and channel with an almost straight contour within the river banks. The size and apparent strength of the B-90 is shown in photographic Lowery Exhibits 10, 11 and 12, and the tidiness and outward maintenance of tug Lowery is shown in Lowery Exhibit 18. The night was described as a fine, clear, moonlit night by Kjolner, the mate of the Bouchard, with the admission by him that no wind or current affected

--181--

the navigation of the Bouchard tow previous to the collision. (A-13). The Lowery tow was first sighted when the Lowery tow was clearing the Dunn Bridge and the Bouchard tow clearing the second railroad bridge, a distance

* References are to the record.

of 2500 to 2600 feet (196). There was no other traffic in the river either southbound or northbound to interfere with a normal and cautious overtaking at the time of the collision or to distract attention from the Lowery flotilla ahead in the river. The Bouchard tow with its speed had complete control of the decision as to the closing and overtaking a tow which the mate knew was slow and had tendency to yaw. There was plenty of time and distance upon the approach to slow to a minimum speed, and even reverse, until he was sure of the speed, location and maneuvers of the Lowery fleet.

The "crossing under the stern" explanation does not impress me. The fancy language and interpretation of Kjolner to distinguish the situation from an overtaking is not plausible. (184, 202-4; 225). His attempts to grasp at straws cast doubt upon his testimony. As, for example, a current, eddy or ebbtide may have caused the Lowery to swing (235-6), and the fear of a yacht in the vicinity. (268). If one accepted his testimony from the deposition read at the trial: "You forget, Sir, I am going from west to east. I am leaving him. I have gone by." (204); "I am going on the east bank from the west bank * * * going across and not north and south" (206), it would be difficult to comprehend that an actual collision occurred.

After much tugging and hauling, some admission as to the real situation of an overtaking comes from the statement of Kjolner that as they were proceeding previous to collision he probably would have reached his destination of the

—182-

Gulf Oil Dock in Rensselaer before the Lowery tow came abreast of it, (208-10), and at last the guarded statement that it was his intention to get further downstream than the Lowery was (211). I accept his statement, although

doubtful, that the two-whistle signal was sounded because I feel it gives further support to its meaning as an overtaking signal, as he testified at the Coast Guard hearing (229).

As to the abrupt sheer by the Lowery tow across the entire navigable channel, there is nothing in the record but conjecture, speculation and assumption upon which to base such a finding. The most significant and silent answer to this contention is the location of the sunken Marion O'Neill about 150 feet westward from the east channel line, (46) and about 50 feet east of mid-channel line (60). Even more compelling is the location of the sunken Mae Lowery across the west channel line, the side upon which the Lowery fleet was proceeding downstream when first sighted by the Bouchard. As Cone said, who was on the scene first, the Marion O'Neill went down fast (522-525). The blow, although forceful, was an overriding one which went over the stern of the Marion O'Neill, and it is clear the Marion O'Neill sank immediately and did not move far from the point of contact. The force of the impact is supported by the diver inspection of the Marion O'Neill (78-81), and the derrick operator who baled out the wheat from the Marion. (316-321). Much of the evidence convinces me that the Lowery tow was in good line at or near mid-channel at the time of the collision. It would tax credulity to believe that the tail of the tow swung just prior to the collision to block the entire navigable channel.

The collision, in my judgment, was a combination of error, mistake, confusion, faulty navigation and maneuver, -183- and lack of reasonable care, alertness, foresight and judgment on the part of the mate and deckhand of the Bouchard that solely, proximately and efficiently caused the collision,

the sinkings and the damage. The emergency was not created by the Lowery. The situation was an overtaking one and inasmuch as it is undisputed there was no exchange of signals, and no consent was obtained from Lowery for passage, the law is settled that the burden was on the Bouchard to slow down, keep astern and such distance as to avoid collision. (The Industry, 29 F. 2d 29; The Holly Park, 2 Cir. 39 F. 2d 572).

With this conclusion, to discuss all the contentions advanced by Bouchard to place the fault for the collision on the Lowery fleet would be quite pointless, and would make this opinion much more aimless than probably it is now. The failure of a stern lookout by Lowery, the failure to blow the danger signal by Lowery, the failure of steering wheels on all the barges, the alleged inherent weakness of the barges, and other contentions, fall by the wayside, because I do not find that they contributed to the happening of the accident. The testimony of the experts as to the possibilities and probabilities, as to what might have been or could have been, is not of sound, probative value, because it is my conclusion from direct evidence and inference therefrom that the tow did not sheer, and the sole cause of the sinking of the two barges was the force of the impact. "The collision is sufficient to account for it all." The City of Macon, 121 F. 686.

Much of the testimony of the Bouchard experts, and I acknowledge them as eminent men in their field, is conjectured, and even approaches the mystical and spiritual. It is probably good guessing but not good proof; it comes

from inference based upon inference, presumption based upon presumption. (United States v. Ross, 92 U. S. 281; Looney v. Metropolitan & R.R. Co., 200 U. S. 480-488).

Statements that the Mae Lowery might not have sunk if it were a good, sound, strong, rigid boat does not have much meaning when the facts show that the last barge directly behind it was struck with such force that the entire tow surged forward alongside the Lowery motor vessel. There is no evidence present to show something was not done to save the Mae Lowery in the short period of time before she settled. It may also be that the Lowery barges were nearing the end of their economic life, but it seems safe to say that if the collision had not occurred they surely would have made the landing at the Cargill elevators and discharged their cargo before they were forced to graceful retirement.

The half damage principle in the law applied to old and infirm boats is applied to situations where the boats do not have the fair and ordinary strength to resist slight or ordinary contact. Much of the law cited by Bouchard is good, sound law but it does not fit the facts here, and is clearly distinguishable.

The Cargill libel and Bouchard cross-libels

The previous discussion settles the issues in the Cargill libel and the impleading petition therein against Inland Survey Bureau, Inc. Under the charter arrangement for the carriage of grain (Cargill Exhibit 2) Lowery shall not be responsible for damage arising from collision unless caused by its negligence. I have found Bouchard solely responsible, and Lowery not at fault, and Cargill, Inc. is entitled to a decree in full, under my reasoning, solely against the interests of Bouchard.

—185—

Despite the speculation again that the Lowery fleet was old, unseaworthy, unfit for the voyage and a menace and

nuisance to navigation, the best evidence is that it had transported over the years and was transporting at this time cargoes of grain, and on other occasions had carried scrap iron. In my judgment it was sufficiently fit and seaworthy for the assigned voyage to Albany. No inspection reports, unless divine, could prophesize the collision below the Dunn Bridge, and I have concluded that such collision was the sole, proximate cause of the sinking and damage, and was caused by the carelessness of the Bouchard.

There is no evidence that Inland Survey Bureau, Inc. acted as agent for Cargill in its inspection for the carriage of grain on this occasion. In fact, the contrary is shown. The privity existed between the underwriters and Inland. The reports, involving scrap iron carriage, were to estimate possible damage claims. When grain was carried as here, the purpose of the inspection was to ascertain the lining of the vessel for the safe transport of the commodity. It was an established, ordinary, good business practice before the risk was taken to insure a cargo. Apparent inconsistency is present, because in one breath Bouchard says the reports are good, detailed reports that show unseaworthiness, and in the next they were not a careful inspection and survey. There is not the slightest intimation of fraud on the part of the Inland Survey Bureau, Inc. in the protection of the substantial interests of its clients. By no stretch of the imagination can I apply the doctrine, even with extension, of MacPherson v. Buick Motor Co., 217 N. Y. 382, and Ultramares Corporation v. Touche, 255 N. Y. 170, to this situation.

The Bouchard cross libels seem to me to be in the nature of an offensive defense, and the issues raised thereby and

—186—

the contentions advanced to support them have been answered.

The Kehoe Libel

The issues here are substantial, and under the peculiar facts present an interesting and close problem in law. The true factual situation is not too difficult to penetrate because the preponderance of the credible evidence convinces me that neither the Bouchard nor the Lowery gave any warning to the Kehoe by alarm signal or searchlight as she came down the river and fouled the sunken Mae Lowery. The impressive testimony for this conclusion is first that of McCormick, the mate of the Kehoe, steering the tug downriver. He testified he heard no alarm or saw no searchlight in the channel or adjacent waters to warn him of the wreck in the channel (346, 348). The Mae Lowery was submerged at the time, and I find no fault in the Kehoe in proceeding under the circumstances at 10 miles per hour, a lawful speed for the channel. The time was 4:00 A.M. and it was still dark when it ran upon the Mae Lowery. Secondly, I accept the statements of Cone, the deckhand, that at the time the Kehoe hit the Mae Lowery wreck the Bouchard and Lowery tugs were lying alongside a dock several hundred feet from the Mae Lowery; he was fixing his lines and talking to the men on the Lowery; the Bouchard searchlight was out of order; the Bouchard did not blow any alarm; the Lowery did not blow an alarm or use its light. (564, 565, 569, 570). The other versions of warning by alarms and lights from various locations are too contradictory to accept. The Cone description is plausible because the excitement of the events still prevailed in the night air, and to the great credit of them all as good people,

it was natural to talk over the unfortunate collision, and particularly the fate of the old barge captain, who went down with his ship, and whom they were most anxious to

find. However, it kept their attention from the traffic in the river channel.

The Kehoe libel is directed against the tugs Lowery and Bouchard in rem under the general theory of negligence for lack of due care by reason of the failure of both to stand by and warn the river traffic. The second action in the libel is against Frank A. Lowery, in personam for an alleged violation of the Wreck Statute (33 U. S. C. A. 409) for failure to mark the wreck of the Mae Lowery, as owner, in accordance with the provisions of that law.

In cogent and persuasive briefs, the Proctors for Kehoe contend the Wreck Statute should not be the sole measure for the responsibility of the collision and damage to the Kehoe. The distinction is made that because of the presence of the two tugs in close proximity to the sunken Mae Lowery there was a duty and obligation upon both of them and their crews *to stand by and warn*, which was separate and apart from the duty imposed by statute upon the owner Lowery *to mark* the wreck as prescribed. (emphasis mine). It is not too debatable that if some warning had been given by either tug the second collision might have been averted.

A strong and consistent line of authority has placed the duty to mark upon the owner of the sunken wreck alone. (The Anna M. Fahy, 2 Cir., 153 F. 866; R. J. Moran, 2 Cir., 299 F. 502; Red Star Towing & Transportation Co. v. Woodburn, 2 Cir., 18 F. 2d 77; Berwind-White Coal Mining Co. v. Pitney, 2 Cir., 187 F. 2d 665). The general principle of statutory responsibility is maintained throughout the decisions.

—188—

In the Moran case, citing the Fahy case, it is reiterated: "This court has held that duty is upon the owner and no one else, and that there is no divided responsibility; the

reason being that, if the statute is to be effectual, there cannot be." Again, in Red Star, at page 79, citing the above two cases: "It must be remembered that the tugs do not share in the duty to mark the wreck, whatever their fault for causing it." In the more recent Berwind-White case, at page 669: "It is a matter of public policy reflected in the statute to place the responsibility for marking the wreck squarely upon the owner alone."

As Kehoe maintains, there is intimation in several of the cases that certain conditions may arise to impose the duty upon the tug at fault instead of the owner. However, the extreme in such conditions is shown by the example in The Anna M. Fahy, supra, page 868: "where all representatives of the owner are drowned or where communication with him is impossible from any cause." The question of the liability of the railroad was not decided in the Berwind-White case, and the reasoning was parallel to the possible responsibility of a wharfinger to a business invitee coming into a pier. (See Cornell Steamboat Co. v. Gladstone, 8 F. Supp. 431.)

In my judgment, there is not enough present here for me to qualify the flat principle of responsibility set by higher authority. The master of the tug Lowery was on the scene at all times. If he had performed the statutory duty to mark, which he must have known,—and I think standing by and warning would be substantial and probably better performance of the statutory obligation under the circumstances,—the accident might have been averted and his owner relieved of the responsibility commanded by law.

—189—

Despite the situation which is extraordinary in the vessels lying side by side where each could warn, I think liability must be confined to and determined under the Wreck Statute.

However, if I am in error, I would hold the Lowery responsible under the general doctrine of negligence and not the Bouchard. Under the facts as I have found them, the master was aboard and in charge of the Lowery for some time previous to collision by the Kehoe on the wreck. He had nothing to do but try to mark or warn, and he did neither. His searchlight was working and that of the Bouchard was not. His main interest throughout was in the surviving barges of his tow. He knew much better than the Bouchard people where the Mae Lowery lay because he was alongside when it settled and ordered the lines cut from it as it sank. Captain Weber of the Bouchard was not aboard for some time before the Kehoe came down and he gave his mate and deckhand instructions to warn. The Bouchard spent more than an hour looking for the drowned captain and was at the wreck of the Marion O'Neill during that time, which was 1400 or 1500 feet above the Mae Lowery. A capable volunteer, Weber tried to contact the Coast Guard and Engineer to mark the wreck even though the responsibility was not his.

The decision of responsibility under the Wreck Statute is troublesome for me. In reference to the marking, the term "immediately" has been construed to mean within a reasonable time, (The Anna M. Fahy, supra), and in some conditions failure to mark within two hours may be unreasonable. (Petition of Anthony O. Boyle, Inc., 161 F. 2d 966). The approximate time from the sinking of the Mae Lowery and the fouling by the Kehoe would be about ninety

minutes. It is possible that Mr. Lowery had his telephone notice from Tucker at least a half hour before 4:00 A.M. The period of time, if actual notice is necessary to the owner, would be a short period and might be considered

unreasonable. However, his master had immediate, personal knowledge, stayed in the vicinity and did not mark or even attempt to mark. The practicality of the situation should be considered. The most owner Lowery could have done to meet the statute would be to tell Tucker to go down and tell the captain to mark the wreck, which Lowery says he did, when the captain was already there and assumed to know the obligation as a master in charge. Olsen, the master of the Lowery, knew the location of the wreck much better than Mr. Lowery or the Coast Guard at that critical time. Notice to the Coast Guard would not have relieved Mr. Lowery from his liability to make all reasonable efforts to mark, (Berwind-White Coal Mining Co. v. Pitney, supra, page 669), and the evidence does not show effective abandonment by 4:00 A.M.

It is not clear in the law that the knowledge of the master may be imputed to the owner under the Wreck Statute, but under the facts here it should. There is good comparison in Berwind-White, supra, page 669, where the personal knowledge of a general foreman was charged to a corporation. (See Eastern S.S. Corp. v. Great Lakes Dredge & Dock Co., 256 F. 497; Drill Boat No. 4, 233 F. 589). I hold that Frank A. Lowery, in personam, is responsible to the libellant, Kehoe, for violation to mark under the particular circumstances present, because of the knowledge and fault of his master in charge in not marking the wreck Mae Lowery within a reasonable time.

—191—

To summarize the decisions in the five suits:

The Libellant, Frank A. Lowery, may have a decree against the tug Ellen S. Bouchard. Libellant Cargill, Inc. may have a decree in full against the Bouchard interests, the libel against Lowery is dismissed, and in this libel

the impleading petition of Bouchard against Inland Survey Bureau, Inc. is dismissed. The cross libels of Bouchard against the Lowery interests and Cargill, Inc. are dismissed. The owner of the tug Clayton P. Kehoe may have a decree under the second cause of action in its libel against Frank A. Lowery, personally. The first cause of action in this libel against the tug Bouchard and the tug Lowery is dismissed. If necessary, the decrees shall be settled on five days' notice.

I have considered all the evidence and exhibits. I shall file herewith separate findings of fact and conclusions of law in each suit. The exhibits received in evidence shall be returned to the respective attorneys by whom introduced.

Dated: Albany, N. Y.,
January 31, 1955.

Findings of Fact and Conclusions of Law in Civil No. 5006

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 5006

FRANK A. LOWERY,

Libellant,

—against—

Tug ELLEN S. BOUCHARD, Motor Tug ELLEN S. BOUCHARD, INC. and BOUCHARD TRANSPORTATION COMPANY, INC.,

Claimants-Respondents.

HON. JAMES T. FOLEY, *D.J.*

FINDINGS OF FACT

1. That Frank A. Lowery, a resident of the State of New York, was the owner of the M/V Frank A. Lowery/ and the barges Marion O'Neil, Mae Lowery, Inez Lowery, Warren W. Clute, Betty L. and Gabe Heffern. Motor Tug Ellen S. Bouchard, Inc. was the owner of the Tug Ellen S. Bouchard.

2. M/V Frank A. Lowery is a converted barge of 240 gross and 195 net tons, 108′ long, 21′ wide and 15′ deep in the middle. It was built in 1918, equipped with a 240 H.P. diesel engine in 1929. The six Lowery barges named above were all wood with rounded bows and square sterns, 110′ long, 22′ wide and 12′ deep in the middle. Tug Ellen S. Bouchard was a steel hull diesel tug of 128 gross and 64

net tons, 1000 H.P., built in 1951, 81.7′ long, 25′ wide and 10.9′ deep. Its pushtow, at the time of the collision, the B-90, was a steel barge of 1276 gross and net tons, built in 1951, 230′2″ long, 43′2″ wide and 14′5″ deep.

3. On the early morning of September 25, 1953, the Lowery flotilla was proceeding down the Hudson River with the barges named in tow in tandem style behind the motor vessel by 75 foot hawsers. The fifth barge in line was the Mae Lowery, the sixth was the Marion O'Neil. This tow cleared the Dunn Memorial Bridge at Albany and was proceeding on the starboard side of the channel, with its tow at or near mid-channel. It was sighted as it cleared the Dunn bridge by the Bouchard tow, which was at the railroad bridge 2500 or 2600 feet above the Dunn bridge. As it cleared the Dunn bridge, the Lowery tow reduced its speed from 2½ miles per hour to 1½ miles per hour. The Lowery tow was bound to the Cargill grain elevators on the west side of the channel, a short distance below, at the Port of Albany; the Bouchard push tow was bound to the Gulf Oil Dock on the easterly side, or Rensselaer side, of the channel in the same near vicinity.

4. After the first sighting, the Bouchard maintained a speed from 5 to 7 miles per hour, and kept closing on the Lowery flotilla at this speed. As it came through the Dunn bridge, it blew a two-whistle signal which was not heard or acknowledged, or assented to by the Lowery. The Lowery tow had the standard lights, and its tow was in good line behind its tug. The Bouchard continued, and the deckhand was not sent to the bow of the barge until the Bouchard tow was about 100 feet from the last barge of the Lowery tow. An emergency was present, and on the signal from

the deckhand the engines of the Bouchard were put full speed ahead and the wheel hard right rudder. The port bow of the Bouchard struck the starboard stern of the last barge, the Marion O'Neil, with considerable force. The Bouchard at no time gave a danger signal. The place of contact was at a point 800 to 1100 feet below the Dunn Memorial Bridge. The time of the collision was 2:20 A. M. Eastern Daylight Time. The barge Marion O'Neil sank almost immediately, and because the impact was a strong, overriding one, it did not move far from the point of collision. The bow of the Marion O'Neil struck the stern of the Mae Lowery with such force that the entire tow surged alongside the tug Frank A. Lowery. The wreck of the Marion O'Neil, was at a point 1100 feet south of the south edge of the Dunn Memorial Bridge, 300 feet from the Rensselaer shore line, and 400 feet from the Albany shore line. The sunken Marion O'Neil was about 150 feet westward from the east channel line, and about 50 feet east of the mid-channel line. The Barge Mae Lowery sank ten to fifteen minutes later after reasonable efforts to save her, at a place approximately 2500 to 2600 feet beyond the south end of the Dunn bridge, and it lay athwart the west channel line. At the point of collision the channel was approximately 400 feet in width and 17 feet in depth. At the time of the collision it was a clear, moonlit night with good visibility, and there was no wind or current to affect navigation. There was no other traffic, northbound or southbound on the river at the time of the collision.

5. The situation prior to the collision was an overtaking one. The two-whistle signal was given to overtake and pass. There was no danger signal. The speed of the Bouchard tow gave it control of the overtaking situation. There was

nothing done by the Lowery to create the emergency. The Lowery tug was in good line behind its tow, was at or near mid-channel, and its tow did not abruptly sheer to block the entire navigable channel. The Bouchard should have reduced its speed to a minimum, or even reversed its speed, to insure safety and prevent collision. The mate of the Bouchard knew the Lowery tow was slow and had tendency to yaw. There was no fault or carelessness on the part of the Lowery or its personnel under the circumstances present.

6. The collision was the direct and proximate cause for the sinking of the barges Marion O'Neil and Mae Lowery. The impact was a severe one which crushed the stern of the Marion O'Neil. The barge did not sink from any inherent weakness or infirmity but solely by reason of the effects of the severe collision. The barges were sufficiently staunch, seaworthy and maneuverable for the purposes of their voyage, and would have discharged their cargo at the Cargill grain elevators except for the collision. The Lowery flotilla had made this voyage on many occasions over a long period of years.

CONCLUSIONS OF LAW

1. The Bouchard had the burden and obligation under the circumstances to slow down, keep astern and at such distance as to avoid the collision. The situation was a normal overtaking one and the Bouchard was in control of such overtaking and its consequences.

2. The collision was caused solely by a combination of error, mistake, confusion, faulty navigation and maneuver, together with lack of reasonable care, alertness, foresight

and judgment on the part of the mate and deckhand of the Bouchard that solely, proximately and directly caused the collision, the sinkings and the damage.

3. The tug Ellen S. Bouchard and those in charge of her were solely at fault and responsible for the collision, sinkings and damage. There was no fault on the part of the tug Lowery, and those in charge of such tug, and its tow, that caused or contributed to the collision. The force of the collision solely, proximately and directly caused the sinkings and damage. The Lowery tug and barges were sufficiently staunch, fit and seaworthy for the voyage they undertook.

4. The Libellant is entitled to an interlocutory decree in its favor with appropriate interest and costs.

JAMES T. FOLEY
United States District Judge

Dated: Albany, New York,
January 31, 1955.

—200—

Report of Commissioner

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 5017

CARGILL, INC.,

Libellant,

—against—

TUG FRANK A. LOWERY and FRANK A. LOWERY, TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. and BOUCHARD TRANSPORTATION CO., INC.,

Claimant-Respondents,

—and—

INLAND SURVEY BUREAU, INC.,

Respondent-Impleaded.

The above entitled action was tried before the Hon. James T. Foley, United States District Court Judge for the Northern District of New York. Judge Foley rendered his opinion directing that a decree be entered in favor of libellant to recover the damages, with interests and costs, sustained to its cargo of grain involved in said action, against the tug ELLEN S. BOUCHARD in rem, motor tug ELLEN S. BOUCHARD, INC. in personam and BOUCHARD TRANSPORTATION CO., INC., in personam directing that the libel be dismissed as to the tug FRANK A. LOWERY, in rem and as to FRANK A. LOWERY, in personam, and further directing that the impleading petition against INLAND SURVEY BUREAU, INC., be dismissed.

—201—

Accordingly, an interlocutory decree was entered on the 23rd day of February, 1955. The claimant-respondent appealed to the United States Court of Appeals for the Second Circuit and, in due course, this court affirmed Judge Foley's opinion. Thereupon, the lower court, on motion of libellant, ordered that the Judgment of the Court of Appeals for the Second Circuit be made its judgment and that the interlocutory decree entered on the 23rd day of February, 1955 be affirmed in all respects and, additionally, ordered that the matter be referred to this writer, as commissioner, to ascertain and compute the amount of libellant's damages and to report to the court. Pursuant to this order, I took and filed my oath as commissioner with the Clerk of the United States District Court for the Northern District of New York. Thereafter, I took the testimony of the witnesses produced by the respective litigants, received their exhibits, studied their briefs and the applicable law and respectfully report as follows:

The Lowery flotilla, composed of the motor vessel FRANK A. LOWERY and the barges WARREN W. CLUTE, INEZ LOWERY, BETTY L, GABE HEFFERN, MAE LOWERY and MARION O'NEILL, was proceeding in a southerly direction on the Hudson River at a point parallel to the southern end of the City of Albany at approximately 2:20 A.M. on September 25, 1953 when the

—202—

collision giving rise to this libel occurred. The Lowery fleet was carrying grain, the property of libellant, and its destination was the Cargill grain elevators at the Port of Albany. The motor tug FRANK A. LOWERY was pulling its wooden barges tandem-style, the sixth and last barge being the MARION O'NEILL and the fifth barge being the MAE LOWERY. When the flotilla reached a point ap-

proximately 1000 feet south of the Dunn Memorial Bridge, which spans the Hudson River between South Albany and the City of Rensselaer, the barge MARION O'NEILL was struck in the stern by a steel barge which was being pushed by respondent's tug, the ELLEN S. BOUCHARD. The barge MARION O'NEILL sank almost immediately taking her cargo of 18,500 bushels of No. 3 Red Winter Wheat to the bottom with her. Shortly thereafter, the MAE LOWERY sank and joined her sister barge on the bottom with 19,000 bushels of No. 1 Red Winter Wheat in her holds. The remaining barges reached their destination.

Cargill, Inc. seeks to recover as damages the value of the 37,500 bushels of wheat contained in the holds of the sunken barges, the value of damaged wheat on the barge INEZ LOWERY and the costs of hiring Inland Survey Bureau, Inc. to advise it concerning the feasibility of undertaking salvage operations. Claimant-respondent meets these

—203—

claims by offering proof that libellant did not exercise reasonable care and prudence in an effort to minimize its damages and, additionally, argues that Cargill, Inc. failed in its proof since their efforts were nominal and resulted in increased rather than decreased damages.

POINT I

Damaged Grain Aboard Barges MARION O'NEILL and MAE LOWERY

The issue of damages was uncomplicated to a large degree by a stipulation by and between the parties hereto fixing the value of the sunken grain at $2.00 per bushel immediately prior to the collision (95)* (libellant's exhibit

* Note: Numbers in parenthesis refer to the pages of the testimony taken before the Commissioner.

No. 1). Since the parties agreed as to the quantity and value of the grain the only issue remaining to be resolved is whether libellant discharged its duty to minimize damages.

That one whose property is damaged by another has a duty to minimize his damages is a legal principle as old as the law of damages itself. Justice and policy forbid anyone from collecting damages in excess of those which the injured party using all the skills and knowledge available to him might have avoided by the exercise of reasonable care. (The Baltimore v. Rowland, 75 U. S. 377; 19 L. ed. 463.) To deviate from such a rule would be tan-

—204—

tamount to allowing the injured party to compound the negligence of the defendant to his own advantage. Not only would this be inconsistent with reason but it would violate all those principles of justice designed to equate a wrong with a just but minimum amount of compensation. One who commits a negligent act should be held responsible for the consequences normally resulting therefrom, but in no event should he become the victim of a chain reaction of events resulting in increased damages, if the injured party in the exercise of prudence could have prevented the same.

In my view, it would serve no useful purpose to discuss the duty of minimizing damages for it has been long and well established in the law of admiralty from the days of the sailing vessel to the present. It is my sole concern to determine from the evidence if libellant did everything that a reasonable and prudent grain owner, possessing identical skills and knowledge, would have done in like circumstances. In my opinion the libellant did not discharge its duty of minimizing damages and, in that respect, failed in its proof.

The fact that Judge Foley found that claimant-respondent BOUCHARD was solely responsible for the collision and stated that libellant was entitled to a "decree in full"

—205—

(Judge Foley's opinion, page 16) over against BOUCHARD, and, subsequently, ordered that libellant recover its damages (Order and Notice of Entry, Civil No. 5017) from BOUCHARD, does not mean, as counsel for libellant argues, (4, 5, 7, 9, 10, 12, 13, 14) the loss was total. Rather, I take Judge Foley's language to mean that libellant is entitled to recover in full its provable damages. (O'Brien Bros. v. The Helen B. Moran, 160 F. 2nd 502.) The case was tried before Judge Foley on its merits as they related to liability. Proof as to damages was deferred. I reject Mr. Atkin's theory (21) which he advanced in the following language: "But any submission Mr. Commissioner . . . it is the finding of the Court that the grain on the barges MAE LOWERY and MARION O'NEILL were a total loss and that is binding upon the Commissioner." To accept such a theory, I would have to consider the purpose of this reference to be whether the determination of Judge Foley with respect to damages is correct. Rather, I regard the reference as an order to ascertain and compute libellant's damages from the testimony of the witnesses and the exhibits received in evidence.

The first and only witness called by libellant was Melville J. Horn, the President of Inland Survey Bureau, Inc. Mr. Horn testified that he was retained by Appleton

—206—

and Cox, Inc., insurance underwriters, who had settled the loss with Cargill, Inc. under a loan receipt (25). Mr. Horn's firm was retained on the morning of September 25, 1953, the day of the collision, and a Mr. Hyland was sent to Albany to investigate and to report back to Mr.

Horn. The witness himself never came to Albany. Upon arriving in Albany, Mr. Hyland consulted with a Mr. Hockberg of Millhurst Mills, Freehold, New Jersey and with a Mr. Ormsby of Soybeans Products Co. in Oswego, New York, both of whom had been requested to proceed to Albany by Mr. Horn for the purpose of making an offer for the grain (26). On September 26, 1953 Mr. Hockberg made an offer of Two Thousand ($2,000.00) Dollars for the cargo in its "as is" condition plus one-half of any profit (32). Later that same day Mr. Ormsby made a flat offer of Two Thousand ($2,000.00) Dollars for the cargo "as is" (32). During the morning of September 28, 1953, Mr. Hockberg withdrew his bid and Mr. Ormsby's bid was rejected (35). Mr. Horn testified that the reason for rejecting the bid and ultimately abandoning the cargo was because Captain Westerfeld of the U. S. Engineers had informed him on the morning of September 28, 1953 that something would have to be done immediately to clear the navigable channel (34). Additionally, a Mr. Connie Ezmark had informed him that he would not undertake

salvage operations because he was only interested in the hulls (56). Mr. Horn didn't ask the opinion of any salvors as to the cost of salvaging the cargo (89) but estimated that it would cost not less than $12,000.00 (61). This estimate was based on his own experience in other salvage operations where the U. S. Army Engineers refused to permit salvaging of cargo unless the hulls were raised and disposed of (42). It was not a conclusion arrived at after weighing all the factors present at the site and time of this collision. Libellant's exhibit No. 10 in the trial before Judge Foley showed that the MARION O'NEILL was sunk in about 17 feet of water and that at low tide the top of the barge was between 5.6 feet and 7.5 feet below the surface of the water. The MAE LOWERY was 1.6

feet above the level of the water at low tide. These sunken barges contained in their holds 37,500 bushels of grain valued at $75,000.00 just prior to the collision. The owner of this grain is, admittedly, one of the largest grain operators in the world and though it doesn't deal in damaged products as a matter of policy it must be presumed that it had knowledge that reconditioned grain had a market value. Certainly, if libellant's cargo had been uninsured it would have taken every reasonable effort to minimize its loss by salvaging the grain, reconditioning it and selling it

for animal feed. It can only be excused from that duty under the present circumstances if the cost of salvaging and reconditioning the grain would exceed the value of the salvaged grain. (C. J. S. Vol. 25 #33; Pratt v. The Havilah, 50 Fed. 331; O'Brien Bros. v. The Helen B. Moran, 160 F. 2nd 502, 504.) Libellant offered no proof of what an actual salvage operation would cost nor any evidence of the market value of reconditioned grain. In fact, libellant did not even attempt to contradict the evidence of the claimant-respondent that the grain could be reconditioned and sold at a price that would have prevented an increase in damages.

A careful study of Mr. Horn's testimony as well as the testimony of libellant's other witnesses at the trial before Judge Foley, has failed to convince me that a reasonable, prudent attempt was made to minimize damages. The libellant leans heavily on the fact that the barges were sunk in a navigable channel thereby causing the U. S. Army Engineers to exert some pressure for their prompt removal. Admittedly, this is a fact that must be considered in determining if libellant's decision to abandon its cargo was justified. However, when Mr. Horn's lengthy experience in salvage operation (24) together with the specialized

knowledge that must be imputed to libellant are considered, it seems reasonable to me that more positive steps should

—209—

have been taken to ascertain if salvage operations would have been commercially expedient. Neither libellant nor Mr. Horn inquired of any salvors what the actual cost of raising the cargo and hulls would be. No inquiry was made with respect to marketing damaged grain. The shortness of time cannot excuse these lapses. The U. S. Army Engineers did not begin salvage operations until September 29, 1953, four days after the sinkings. Certainly, a man of Mr. Horn's experience could have ascertained during that time what it would have cost to raise the cargo and moor the hulls on the shoreline. Additionally, he could have determined what price per ton damaged grain was selling for in the animal feed market. It might be argued that he would not have been able to conclude whether the number of tons of grain recoverable would bring a monetary return large enough to justify the expenditures for salvaging. This argument is without merit in face of the consistent position of the courts that frequently salvage operations are necessary in order to ascertain the extent of the damage. If after raising the damaged vessel and/or cargo it is determined that its value is less than reasonable costs of repairs or of reconditioning, there would be a constructive total loss and the expenses for raising the vessel and/or cargo would be allowed. This principle was clearly

—210—

stated in the case of Pettie v. Boston Tow-Board Co. (1891), 49 Fed. 464, and it is still applicable today. The court said (467):

> "It is undoubtedly the duty of the owner of a vessel, which has been sunk by the negligent act of another,

to endeavor to raise and repair her and save her cargo, if under the circumstances of the case, there is a reasonable probability that he can thereby mitigate the loss. If under such circumstances, he does not do so, he will not be permitted to profit by his own remisses. No principle in the law of damages is better established than that indemnity does not include damages which arise in consequence of the inactivity of the complaining party. This principle has often been applied in admiralty, and to encourage reasonable endeavor on the part of those who have sustained loss, to mitigate the consequences, the courts have allowed to the owner of a vessel sunk in a collision the costs of raising her, besides her value before the wreck, when it was necessary to raise her to ascertain whether she was worth repairing. (Pettie v. Boston Tow-Boat Co., 49 Fed. 464.)

It is to be noted that the courts, in order to encourage injured parties to reasonable endeavors to minimize damages, allow the costs of salvaging if it then appears there is a constructive total loss. Conversely, if the complaining party does not take reasonable and prudent steps to mitigate his loss recovery for those damages resulting from his inactivity will be denied. (Baltimore v. Rowland, 75 U. S. 377; Pratt v. The Havilah, 50 Fed. 331.)

The libellant did not argue that its cargo, as a result of

the sinkings, was a total loss for the purpose for which it was intended, i.e., human consumption. All parties agreed that once grain has been submerged in water for a period in excess of twenty-four hours it cannot thereafter be dried sufficiently for human consumption. In the case at bar,

it would have been impossible to raise the grain from the holds of the sunken barges within that period. That raises the question whether libellant would have been justified in abandoning the cargo because it had become a total loss for human consumption. This question, in my opinion, must be answered in the negative. The libellant offered no proof with respect to the perils against which the cargo was insured nor was any proof offered showing that the perils insured against destroyed or so injured the cargo as to cause it to be of trifling or no value to libellant for the purpose and use for which it was intended. The fact that the insurance underwriter may have paid the full amount of libellant's claim is not, by itself, sufficient proof of a total loss. In the case of Weirton Steel Co. v. Lebrandtsen-Moller Co., Inc. (2nd Cir. 1842), 126 F. 2nd, 593, the Court said:

> "The fact that the underwriter agreed to pay the full amount claimed . . . is not material; for all we know, he may have thought it worthwhile to keep the goodwill of an important customer."

—212—

Additionally, the evidence offered by libellant clearly indicates that they didn't regard the cargo as a total loss even after it had been submerged for a time sufficient in length to make it unfit for human consumption. The cargo sank at approximately 2:00 A.M. September 25, 1953 and libellant didn't formally abandon it until the morning of September 28, 1953 (4,214).

The only probative evidence offered with respect to the cost of salvaging the damaged cargo was offered by the respondent BOUCHARD. Captain Theodore De Mars testified that it would cost $5,731.00 to salvage the cargo and deliver it to the Cargill plant at Albany (171), and $7,837.00

for a similar operation with delivery at New York City (111). Since the drying equipment at Albany was inadequate (102) I will only consider the cost of salvaging and delivering in New York. Captain De Mars testified in detail as to the equipment needed and the costs per day per unit of equipment (132) to raise the wrecks, place the damaged grain in lighter barges, anchor the hulls on the shore, and deliver the damaged grain in New York City. De Mars testified that such an operation could have begun on Saturday morning, September 26, 1953 (111). This testimony is uncontradicted. Presumably, if salvage operations could

—213—

have been started on September 26, 1953, the U. S. Army Engineers would have been satisfied.

Claimant-respondent BOUCHARD called a Mr. Bert Eisenberg and a Mr. Jack Hanisch both of whom are engaged in the business of manufacturing and selling animal feeds. Mr. Eisenberg testified that his company, Animeam Ingredients, Inc., (143) was one of five or six such companies in the Brooklyn area alone that purchased damaged food products, including grain, for resale as animal feed (142). He testified that at the time of the happening of this accident grain of the quality carried on the sunken barges had in his opinion, a retail value of between $55.00 and $60.00 per ton after it had been dried (144). He testified that the drying costs would be between $4.00 and $5.00 per ton. This testimony is uncontradicted.

Mr. Hanisch has been a buyer and seller of damaged grain since 1934 (154). He testified that in his opinion grain of the quality owned by libellant had a retail value, after it had been reconditioned, of between $55.00 and $58.00 per ton (156). This testimony is uncontradicted.

Both Mr. Eisenberg and Mr. Hanisch testified that No. 1 and No. 3 Red Winter Wheat could be totally saturated

—214—

with water and, after reconditioning, have a value equal to or greater than dried brewers grain. Brewer's dried grain had an actual market value of $57.00 per ton during the entire month of October, 1953 (Bouchard Exhibit No. 5 and 5a). This testimony was uncontradicted and the admission of claimant-respondent's exhibit was without objection (178).

The conduct of Inland Survey Bureau, Inc., the subrogee, must be regarded as the conduct of Cargill, Inc. This conduct, in my opinion, was not sufficient under the circumstances to discharge the duty of minimizing damages. Libellant knew that a cargo valued at $75,000.00 was submerged in comparatively shallow water. Yet, beyond assigning its rights under a loan receipt agreement with its insurance underwriters, it did nothing to determine if the cargo could be salvaged and resold. The underwriters retained Inland Survey Bureau, Inc. to study the facts and report if salvaging would be feasible. Mr. Horn, the president of Inland Survey Bureau, Inc. and the gentleman who ultimately made the decision to abandon the cargo, didn't even come to Albany to view and study the situation first hand. He sent a Mr. Hyland whose activities with respect to determining the feasibility of salvaging were, in my

—215—

opinion, nominal. He was not called as a witness for libellant.

For these reasons, I find that the libellant did not discharge the duty to minimize its damages and its loss is partial, rather than total, with respect to the number of bushels that could have been salvaged if libellant had undertaken such an operation. Additionally, I find that libellant's loss is total with respect to the number of bushels that could

not have been salvaged if such an operation had been initiated. Considering the nature of the product involved and the fact that this product was being transported in wooden barges which received a severe blow from the rear by a steel barge causing some of the tarpaulins to be torn away from the holds of both sunken barges and breaking a number of timbers on both vessels (195) I do not think it unreasonable to assume that a quantity of the grain would have floated out of the holds and dispersed itself on the river bed. Captain De Mars testified that, in his opinion, 35,000 bushels could be salvaged. While I recognize the eminent qualifications of Captain De Mars, I am more persuaded by the actual experience of Franklin H. Haber, Chief of Operations of the Army Engineers who supervised the Engineer's salvage operation. He testified that 29,555

—216—

bushels were raised from the holds of the sunken vessels (210). From this testimony I have concluded that had libellant prudently commenced salvage operations it would have been unable to raise 7,945 bushels and as to that amount should be compensated in full. As to the 29,555 bushels that could have been raised, reconditioned and sold libellant's loss is partial and he can only recover the difference between the full value of the grain and what it could have been sold for in the animal feed market in October of 1953.

Libellant offered no proof as to the value of animal feed in September or October of 1953, nor was any proof offered as to costs for reconditioning the grain for resale. Cargill, Inc. also failed to introduce any satisfactory evidence as to the costs of salvaging. Mr. Horn merely stated that, in his opinion, based on prior experiences, it would not be commercially feasible to undertake such a task. (The fact that

he may have been led to this conclusion by Mr. Connie Ezmark's refusal to undertake the job is of little moment.) Mr. Ezmark was only interested in the hulls (35) and gave no detailed breakdown of the costs entailed in order to salvage the grain.

—217—

Accordingly, I find that 29,555 bushels of grain could have been salvaged and delivered in New York City for reconditioning and resale as animal feed at a cost of $7,837.00. This number of bushels could have been reconditioned at a cost of $4.00 per ton or $3,546.96 (145).* After reconditioning, the 886.74 tons could have been sold as animal feed for $50,544.18.

Therefore, I compute libellant's damages to be $35,839.42. This sum is arrived at as follows:

a) 7,945 bushels @ $2.00 per bushel	$15,890.00
b) 29,555 bushels (886.74 tons) @ $57.00 per ton equals $50,544.18; 29,555 bushels @ $2.00 per bushel equals $59,110.00; $59,110.00 minus $50,544.18 equals	8,565.82
c) Cost of raising and delivering grain in New York City	7,837.00
d) Cost of reconditioning grain for resale	3,546.60
Total	$35,839.42

—218—

* Note: 33-1/3 bushels of grain = one ton
29,555 bushels of grain = 886.74 tons

—218—

POINT II

Damaged Grain Aboard Barge INEZ LOWERY

Cargill, Inc. seeks to recover the sum of $1,385.43 which amount it argues represents damages to the grain carried on the barge INEZ LOWERY. This barge did not sink. It reached its destination, the Cargill plant in the Port of Albany. Counsel for Cargill, Inc. stated at the first hearing that he was not prepared to introduce testimony with respect to the grain carried on the surviving barges. Thereafter, he failed to offer any proof as to damages to cargo carried on any of the vessels other than the MAE LOWERY and the MARION O'NEILL. The only evidence touching on damages to grain carried on the INEZ LOWERY was elicited by counsel for claimant-respondent in cross examining Mr. Horn. He testified that when the grain aboard the INEZ LOWERY was dried it produced 769.33 bushels (84). This dried grain was then sold for twenty cents a bushel without competitive bids. Following the reasoning set forth above with respect to the damaged grain carried in the sunken vessels it necessarily follows that libellant had two courses of action that would have mitigated its loss. If the 769.33 bushels (23 tons) had been sold as animal feed it would have yielded the sum of $1,311.00. This approximates the amount it now seeks to recover without

—219—

any proof that an attempt to minimize was made. Secondly, if the grain was not saturated to the degree of 30% it could have been dried and sold for human consumption. Since it was sold as dried grain (84) it must have been dried at Cargill's plant in Albany. Mr. Marshall, the operating superintendent of libellant's plant in Albany, testified that their drying mechanism could not dry grain saturated be-

yond 15% (159). Since the No. 3 Red Winter Wheat had a 13% moisture content when it was loaded on the barges in Buffalo and the No. 1 Red Winter Wheat had a 12.6% moisture content when loaded, the amount of absorption of water as a result of the collision was negligible. Consequently, since libellant has stipulated that the value of the grain prior to the mishap was $2.00 a bushel I find little, if any, diminution in value as a result of the accident. Therefore, I find that the grain aboard the INEZ LOWERY had a value of $1,538.66 which is in excess of the amount sought. As to the grain carried aboard the INEZ LOWERY I find that libellant did not sustain any damage.

—220—

POINT III

Costs of Retaining Inland Survey Bureau, Inc.

The libellant also claims it was damaged in the amount of $527.67 which is the fee charged by Inland Survey Bureau, Inc. for the services rendered to Appleton and Cox, Inc., the insurance underwriters. It is unquestionably the law that an injured party is entitled to recover the reasonable costs of salvaging where it is necessary to undertake such a task to ascertain whether damages can be minimized. (Pettie v. Boston Tow-Boat Co. 49 Fed. 464). Where, however, the actions taken are so nominal that they are not productive of results upon which reasonable and logical conclusions can be based, such actions are not compensable.

I have heretofore set forth in full my reasons for believing that libellant did not prove that it had done everything a reasonable and prudent owner, with like skills and facilities, would have done under similar circumstances. Since I have found that libellant failed in its proof in that respect, it reasonably follows that Cargill, Inc. is not entitled

to recover as damages the sum paid to Inland Survey Bureau, Inc.

I have considered all the evidence and the exhibits and

—221—

I have found that libellant, Cargill, Inc., is entitled to recover from the Bouchard interests the amount of $35,839.42, with interest from September 25, 1953, the costs to be taxed by the court.

Respectfully submitted,

A. FRANKLIN MAHONEY
Commissioner

Troy, N. Y.: February 25, 1957

—222—

STATEMENT

I herewith submit that the fair and reasonable value of my services is three thousand ($3,000.00) dollars. This sum has not been paid to date.

A. FRANKLIN MAHONEY
Commissioner

Dated: February 25, 1957
Troy, New York

Memorandum Decision

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Civil No. 5017

CARGILL, INC.,

Libellant,

—against—

TUG FRANK A. LOWERY and FRANK A. LOWERY, TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN BOUCHARD, INC., and BOUCHARD TRANSPORTATION CO., INC.,

Claimant-Respondents,

—and—

INLAND SURVEY BUREAU, INC.,

Respondent-Impleaded.

APPEARANCES:

ATKINS & WEYMAR, ESQS.,
Proctors for Libellant,
Office & P. O. Address,
70 Pine Street,
New York 5, N. Y.

HORACE T. ATKINS, ESQ.,
Of Counsel.

KRISEL, BECK & TAYLOR, ESQS.,
Proctors for Claimant-Respondents,
Office & P. O. Address,
27 William Street,
New York, N. Y.

MAX TAYLOR, ESQ.,
Of Counsel.

Memorandum Decision

HON. JAMES T. FOLEY, *D.J.*

The Report of the Commissioner as it covers his determination upon reference of the money damages to be paid Libellant Cargill, Inc., by Claimant-Respondents Bouchard, has written exceptions filed to it by both sides. In my judgment, the exceptions of Cargill, which relate mainly to the reasoning by the Commissioner as to the failure of Cargill to minimize damages, are well taken and must be sustained. Such reasoning led to a most drastic reduction of the Cargill claim.

—231—

The exceptions of Bouchard only aimed at collateral matters with no attack upon the amount of money damages fixed by the Commissioner had little merit, in my judgment, and in view of the disposition I make need no discussion and must be denied.

It has been a long voyage. The issue of the liability for the collision occurring on September 25, 1953, between the parties here, together with other interests involved, was decided adversely by me to the Bouchard interests. This opinion is reported in 128 F. Supp. 16, and such decision was affirmed by the Court of Appeals, Second Circuit, on the opinion below. (229 F. 2d 436).

The Report of the Commissioner is not sacrosanct by any means. By its terms Rule 43½ of the Rules of Practice in Admiralty and Maritime cases (28, Rules, U. S. C. A., Rule 43½) provides:

"* * * but the report of the Commissioner * * * shall be treated as presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part when the court, in the exercise of its judgment, is fully satisfied that error has been committed. * * *"

Even the application of the "clearly erroneous" doctrine allows the correction of apparent mistake. (U. S. v. U. S. Gypsum Co., 333 U. S. 364, at page 395; Gindorff v. Prince, 2 Cir. 189 F. 2d 897).

It is always with reluctance that I disturb the fact-finder, and more so here because of the skill and competence of the Commissioner in the conduct of and the rulings at the hearings as evidenced by the record made before him. However, the record of the trial before me was stipulated as part of the record before the Commissioner, and my recollection of it and my review of the evidence before the Com-

—232—

missioner, make the conclusion inescapable that the established rule as to the duty to minimize was too harshly and narrowly interpreted without due regard to the actualities and realities of the situation present at and shortly after the collision. It is also my feeling that if the Proctors for the libellant had argued and briefed the law and facts for the Commissioner as they did for me and suppressed any cock-sure attitude, it is possible their present dilemma might have been avoided. Along this line I am frank to say I did not decide at the trial, or intend to so decide, any issue as to the amount of actual loss sustained by any party. The chief aim was to decide liability and responsibility, and the slight evidence as to damages was taken only to the extent material and helpful on this main issue. The duty to minimize never entered my mind.

However, this established principle of law concerning the duty to minimize, well-discussed by the Commissioner, must be considered and applied in view of the circumstances present. It is a rule of reason and prudence based on reasonable probability and honest, human judgment. It does not require infallibility or exactness of mathematical for-

mula, and I cannot read such absolute in the cases cited by the Commissioner to support his inferences and conclusion. (The Baltimore v. Rowland, 75 U. S. 377; Pettie v. Boston Tow-Boat Co., 49 Fed. 464, 466; Pratt v. Havilah, 50 Fed. 331; O'Brien Bros. v. The Helen B. Moran, 160 F. 2d, 502, 504).

Whether the hiring of a competent cargo surveyor firm, as one would ask the judgment of a lawyer, doctor or engineer, would discharge the duty to minimize is not necessary to this decision because from my analysis the decision

—233—

of Inland Survey Bureau, Inc. not to undertake salvage operations seems clearly justified. In a case with much similarity, it was decided that a 10% reduction for lack of diligence in conducting salvage operations was "a mere speculative reduction for which there exists no basis in fact." (Grace & Co. v. Charleston Lighterage & Transfer Co., 4 Cir. 193 F. 2d, 539, 544).

Mr. Horn, President of the Inland Survey Bureau, was the straw man set up by the agile-minded proctors for Bouchard both at the main trial and at the hearings before the Commissioner. I found no taint of any fraud or incompetence on his part or his firm when I rendered my opinion, nor do I see any now. This firm has been in the marine survey business since 1927 or 1928 (page 24)* and the most eloquent and honest testimonial to the qualifications of Horn was made by Captain DeMars, the survey expert, called by Bouchard. (page 136). The gist of such testimony is that Horn was one of the best to appraise the cargo problem of sunken wheat as it existed at the time and place.

There are many factors actually present that militate against the conclusion of the Commissioner and support the

* Page references shall only be to record before Commissioner.

judgment, at least to show reasonableness, of Horn. Many are listed in my opinion and many are in the record before the Commissioner. The collision happened on a week-end. It was one of extreme force, as shown by the fact the barge captain at the end of the tow had no chance to get out. The testimony of the Army diver showed that this barge was practically split wide open. An emergency existed in the channel because the tug Kehoe ran afoul of the other sunken barge several hours after the collision. The barge owner formally and legally abandoned the barges several hours

—234—

after the sinking. The Army Engineers were atop the situation the following morning and knew more about it than anyone else. I see no fault in Horn being down in New York City, a center of responsibility for decision by the Army Engineers with modern communications present to receive and evalute reports from the people on the scene. Brennan, the Army Engineer in charge on the scene, was impressive at the main trial.

The cargo sunk was wheat, a perishable commodity, admittedly saturated and expanded to a point which changed its character, and as Horn put it before the Commissioner, just as wet one foot under the water as one hundred feet. (page 64). (See The Baltimore, pages 386, 387).

Another fact of great importance that had to be weighed by Horn in the interests of his client was the Summary Removal Statute (33 U. S. C. A. 415). This statute (the Proctors for libellant admit it was not brought to the attention of the Commissioner) gave the Army Engineers the right to take over at any time in order to clear the channel. I think it important to consider because if Horn undertook salvage he had it all, cargo and barges, with the addition of someone looking over his shoulder armed with statutory authority to interfere if not satisfied.

A most decisive factor in the record that favors and warrants the decision not to spend money on private salvage is the admitted immensity of the task. Horn's estimate was two lighter barges, derrick, diver, pumps, clam shell, etc. (page 57). Then Captain DeMars with the statement that the equipment to salvage would have to come from New York, and he listed steam crane, barges, tug, etc. etc. (pages 112-13). Match this against what the Army finally did and the decision of Horn, whether he be acting for Cargill or the underwriters, is surely reasonable, if

—235—

not obvious. Many imponderable elements are natural in such situations.

Most vital of all to justify the estimate of Horn that it would cost $12,000.00 is the fact it actually cost the Army Engineers $17,751.43 for the entire operation. The wheat sold by the Army only obtained $2,945.00. It is interesting to note that the private bids requested by Inland were only slightly below the amount which was received by the Army Engineers after competitive bidding pursuant to the Statute. This net actual expenditure of $14,806.43 cannot be laughed off as government bookkeeping or the result of a "give-away" based merely upon innuendo without basis in fact. To corroborate further the intelligence and competency of Inland, the hulls were salvaged by Connie Ezmerk's firm, the man Inland originally contacted on the whole problem. Again, this contract was awarded after competitive bidding.

There is nothing between the testimony of DeMars, a hull surveyor, and the two alleged experts from New York, one a dairy farmer, in the effort to establish the value of animal feed in the New York market. Even if such evidence were reliable and in closer harmony with reality,

it is questionable whether the New York City value would legally be the proper market for the ascertainment of value in this case. The proper measure of damages is the damage sustained by the party *at the time and place of injury.* (Smith v. Condry, 42 U. S. 28; The City of New York, 23 Fed. 616.) Despite this question the holding that the libellant should transport the wheat to the New York market again accentuates the extreme burden sought to be placed by a tort feasor on an innocent party.

—236—

There is not one fact I can find to support the exaggerated and speculative inference urged by Bouchard that someone obtained a tremendous bonanza from the purchase of this wet and damaged wheat. The combined experience and competence of Inland Survey and the Army Engineers in the ordinary course of their business are the best answer to such unproven speculation.

All this adds up to the common sense of the situation. As recently stated by the United States Supreme Court in Peak v. U. S., decided March 25, 1957: "That seems to us to be the common sense of the matter, and common sense often makes good law."

I shall confirm the disallowance of the sum of $1,385.43 for the damaged grain aboard the Inez Lowery, which did not sink. I do this upon the second ground set forth by the Commissioner at page 20, inasmuch as the evidence supports his conclusion that the amount of water absorbed by the grain was negligible.

The libellant may recover for a total loss of cargo on the barges Marion O'Neil and Mae Lowery money damages from the Bouchard interests in the amount of $75,000.00. Libellant may recover the expenditure of $527.67 for the services of Inland, for a total award of $75,527.67,

with interest and costs, in accordance with the interlocutory decree.

The exceptions of the libellant in accord with and material to this decision are Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth only as to amounts above, and Seventeenth. These exceptions to the Report are sustained and granted. The exceptions filed by Bouchard, Claimant-Respondent, are denied.

—237—

The Report of the Commissioner is modified as indicated herein, and as so modified is confirmed. A final decree in accordance herewith shall be submitted if agreed upon, otherwise settled on three days' notice.

Dated: Albany, New York,
June 4, 1957.

Order

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 5017

CARGILL, INC.,

Libellant,

—against—

TUG FRANK A. LOWERY AND FRANK A. LOWERY, TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. AND BOUCHARD TRANSPORTATION CO., INC.,

Claimant-Respondents,

—and—

INLAND SURVEY BUREAU, INC.,

Respondent-Impleaded.

SIRS:

PLEASE TAKE NOTICE that the within is a copy of a proposed order, the original of which will be presented for signature before the Honorable James T. Foley, Judge of this Court, in the United States Court House at Utica, New York, on the 17th day of June, 1957, at 10:00 o'clock A.M. of said day, at the commencement of the Motion Term of said Court, or as soon thereafter as counsel may be heard.

Order

Dated: New York, N. Y.,
June 10, 1957.

Yours, etc.,

JAY S. CAPLAN
11 North Pearl Street
Albany, N. Y.

and

ATKINS & WEYMAR
70 Pine Street
New York, N. Y.

Proctors for Libellant

To:

JAMES F. DALTON, Esq.
11 North Pearl Street
Albany, N. Y.

—and—

KRISEL, BECK & TAYLOR, Esqs.
27 William Street
New York, N. Y.

Proctors for Claimant-Respondents

G. A. PORTER, *Clerk*
United States District Court,
Northern District of New York
Utica, New York

The proposed order is identical with the Final Decree following herewith.

Final Decree

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 5017

CARGILL, INC.,

Libellant,

—against—

TUG FRANK A. LOWERY AND FRANK A. LOWERY, TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC., AND BOUCHARD TRANSPORTATION CO., INC.,

Claimant-Respondents,

—and—

INLAND SURVEY BUREAU, INC.,

Respondent-Impleaded.

Exceptions having been taken by Libellant, Cargill, Inc. and by Motor Tug ELLEN S. BOUCHARD, Inc., and Bouchard Transportation Co., Inc., Claimant-Respondents, to the Commissioner's Report, and said exceptions having been brought on for hearing before the Hon. James T. Foley on the 18th day of March, 1957, and after hearing Atkins & Weymar, Esqs., proctors for Libellant, by Horace T. Atkins, Esq., of counsel, in support of said exceptions of Libellant, and Krisel, Beck & Taylor, Esqs., by Max Taylor, Esq., of counsel, in opposition thereto, and after due deliberation having been had thereon, and the Court having rendered and filed its opinion in writing sustaining and granting Libellant's exceptions numbered second, third,

fourth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth, (but exclusive of the alleged damage of $1,365.43 allegedly resulting from damage to 768.33 bushels of grain on the barge INEZ LOWERY), and seventeenth, and denying all exceptions filed by Motor Tug ELLEN S. BOUCHARD, Inc., and Bouchard Transportation Co., Inc., Claimant-Respondents,

Now, on motion of Jay S. Caplan, Esq., and Atkins & Weymar, Esqs., proctors for Libellant, it is

—240—

ORDERED, that the exceptions of Libellant numbered second, third, fourth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth, (but exclusive of the alleged damage of $1,365.43, allegedly resulting from damage to 768.33 bushels of grain on the barge INEZ LOWERY), and seventeenth, are sustained and granted, and all exceptions of Motor Tug ELLEN S. BOUCHARD, Inc., and Bouchard Transportation Co., Inc., Claimant-Respondents, are hereby denied.

Dated, Albany, N. Y.,
June 17, 1957.

JAMES T. FOLEY
U.S.D.J.

Notice of Appeal

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 5017

CARGILL, INC.,

Libelant,

—against—

TUG FRANK A. LOWERY AND FRANK A. LOWERY, TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. AND BOUCHARD TRANSPORTATION CO., INC.,

Claimant-Respondents,

—and—

INLAND SURVEY BUREAU, INC.,

Respondent-Impleaded.

SIRS:

PLEASE TAKE NOTICE that claimant-respondents, tug ELLEN S. BOUCHARD, Motor Tug Ellen S. Bouchard, Inc., and Bouchard Transportation Co., Inc., hereby appeal to the United States Court of Appeals for the Second Circuit from each and every part of the final decree entered herein on June 17, 1957, and from so much of the order entered herein on June 17, 1957, that sustains libelant's exceptions to the Commissioner's report, and denies the exceptions of claimant-respondents.

Notice of Appeal

Dated: New York, N. Y., June 26, 1957

Yours, etc.

JAMES F. DALTON, ESQ.
11 North Pearl Street
Albany, N. Y.

&

KRISEL, BECK & TAYLOR
27 William Street
New York, N. Y.

Proctors for Claimant-Respondents

To:

JAY S. CAPLAN, ESQ.
11 North Pearl Street
Albany, New York

&

ATKINS & WEYMAR, ESQS.
70 Pine Street
New York, N. Y.

Proctors for Libelant and Respondent-Impleaded

24763 No. 916 LIBRARY SUPREME COURT

Office - Supreme Court, U.S.
FILED
APR 11 1958
JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 24763

CARGILL, INC.,

Libelant-Appellee,

—against—

TUG FRANK A. LOWERY and FRANK A. LOWERY,

Claimant-Respondents,

TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC., and BOUCHARD TRANSPORTATION CO., INC.,

Claimant-Respondents-Appellants,

—and—

INLAND SURVEY BUREAU, INC.,

Respondent-Impleaded-Appellee.

APPENDIX FOR APPELLEE

UNITED STATES COURT OF APPEALS FILED OCT 23 1957 SECOND CIRCUIT

ATKINS & WEYMAR
Proctors for Appellee

INDEX TO APPELLEE'S APPENDIX

	Record Page	Appendix Page
Final Decree, James T. Foley, U. S. D. J., dated June 17, 1957		1a
Excerpts From Testimony of Main Trial		3a
VOLUME I		
Frank A. Lowery		
Direct	A52-A53	3a
VOLUME II		
Witnesses for Frank H. Lowery		
Ambrose F. Brennan		
Direct	37-53	4a
Cross	55-58	5a
Alexander H. Schnapp		
Direct	75-81	7a
Cross	83-84	8a
Witness for Cargill		
Melville J. Horn		
Direct	115-116	9a
VOLUME III		
Witness for Bouchard		
Eugene Meyer		
Cross	319-322	10a
Redirect	323-324	11a

	Record Page	Appendix Page
VOLUME IV		
Witness for Bouchard		
William R. Bagger		
Direct	473-505	12a
Excerpts From Testimony Before the Commissioner		13a
VOLUME I		
Witness for Cargill		
Melville J. Horn		
Direct	23-51	13a
Cross	54-80	32a
Redirect	81-82	46a
Recross	87-89	46a
VOLUME II		
Witness for Cargill		
Melville J. Horn. Recalled		
Direct	105-106	49a
Witnesses for Bouchard		
Theodore De Mars		
Cross	115-136	49a
Recross	140	51a
Bert Eisenberg		
Cross	148-150	52a
Jack Hanisch		
Cross	157-160	53a

	Record Page	Appendix Page
Marcus Marshall		
Recalled		
Direct	163-174	54a

VOLUME III

Eugene C. Meyer		
Cross	187-195	55a
Recross	201-205	59a
Franklin H. Haber		
Cross	212-223	60a
Redirect	223-225	65a
Recross	233-235	67a
Re-Redirect	235-236	68a

United States District Court

NORTHERN DISTRICT OF NEW YORK

Civil No. 5017

[SAME TITLE]

Final Decree Dated June 17, 1957

An interlocutory decree on mandate having been entered in this cause on March 19, 1956, and the matter of libellant's damages having been referred to A. Franklin Mahoney, Esq., Commissioner, to ascertain and compute the amount of same, and to report thereon to this Court with all convenient speed, and said report having been duly filed herein, and exceptions having been taken by both parties to said report, and the Court having heard said exceptions and having rendered and filed its opinion on June 4, 1957, and having determined that libellant recover its damages in the sum of $75,527.67, with interest and costs, in accordance with the interlocutory decree, and an order having been entered herein disposing of the said exceptions, pursuant to the aforesaid decision, on June 17th, 1957, and the costs of the libellant having been taxed in this Court in the sum of $3,461.70, and the costs of the libellant having been taxed in the Court of Appeals, as appears by the mandate filed herein, in the sum of $136.80, and the costs in this Court, of respondent-impleaded Inland Survey Bureau, Inc. upon the dismissal of the impleading petition against it having been taxed in the sum of $35.50, and the costs of said respondent-impleaded in the Court of Appeals, as appears by the mandate herein, having been taxed in the sum of $129.87,

Now, on motion of Jay S. Caplan, Esq., and Atkins & Weymar, Esqs., proctors for libellant, it is

Final Decree Dated June 17, 1957

ORDERED, ADJUDGED and DECREED that libellant, Cargill, Inc., recover of and from the tug ELLEN S. BOUCHARD and her claimant and stipulators for value and costs, and Motor Tug ELLEN S. BOUCHARD, Inc., and its stipulators for costs, and Bouchard Transportation Co., and its stipulators for costs, its damages in the sum of $75,527.67, with interest thereon from the date of the loss, September 25, 1953, to the date of this decree amounting to the sum of $16,889.22, and costs as taxed in libellant's favor in this Court in the sum of $3,461.70, and as taxed in the Court of Appeals in the sum of $136.80, making in all the total sum of $96,015.39, and that libellant have execution therefor; and it is further

ORDERED, ADJUDGED and DECREED that respondent-impleaded, Inland Survey Bureau, Inc., recover of and from Motor Tug ELLEN S. BOUCHARD, Inc. and Bouchard Transportation Co., Inc., and their respective stipulators for costs, its costs as taxed in this Court in the sum of $35.50, and as taxed in the Court of Appeals in the sum of $129.87, making in all the total sum of $165.37, and that said respondent-impleaded have execution therefor; and it is further

ORDERED that unless this decree be satisfied, or an appeal be taken within ten (10) days after service of a copy of this decree, with notice of entry thereof, on proctors for the claimant-respondents, the claimant-respondents and their stipulators cause the engagement of their stipulations to be fulfilled, or show cause within four (4) days, or on the first subsequent day of jurisdiction, why execution should not issue against their goods lands and chattels.

Dated: Albany, N.Y.,
June 17, 1957.

JAMES T. FOLEY
U. S. D. J.

Frank A. Lowery—Claimant—Direct

Excerpts From Testimony of Main Trial

—A32—

• • • • •

FRANK A. LOWERY, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Heckman:

• • • • •

—A52—

• • • • •

Q. Now in your experience on the Barge Canal have you seen grain boats, have you seen Barge Canal boats that were loaded with wheat sink? A. Yes.

Q. And are you familiar with the difficulties involved in salvaging a vessel that is loaded with grain in that situation? A. Especially when she is filled up.

Q. When she is fully loaded? A. Yes.

Q. What is to be expected in a situation like that? A. After they're in the water for an hour or so they expand.

—A53—

Q. The grain expands? A. Yes, and busts the sides.

Q. Now when you were told of the sinking of these two boats did you give consideration as to whether or not you would make any effort to raise those boats? A. Yes.

Q. And did you reach a conclusion? A. Certainly.

Q. And what conclusion did you reach? A. I knew they would be beyond repair.

Q. And when did you reach that conclusion? A. I reached it right away, immediately.

Q. You mean right away after what? A. After I had the telephone call.

Q. And what did you determine that you do with the vessels? A. I would abandon them.

Ambrose F. Brennan—for Frank A. Lowery—Direct

Q. Did you make any effort to notify any Government authorities of your abandonment of the vessels? A. Yes.

• • • • •

—37—

AMBROSE F. BRENNAN, called as a witness in behalf of Frank A. Lowery, being duly sworn, testified:

Direct Examination by Mr. Heckman:

• • • • •

Q. What is your occupation? A. I am employed by the corps of engineers, US Army.

Q. In what capacity? A. Engineer in charge of the Albany Sub-Office, New York District.

Q. And of course that area includes the Hudson River south of the Dunn Memorial Bridge for at least a mile? A. That is right.

Q. Now, were you such September of 1953? A. I was.

Q. And tell the Court how long you have been in charge of the Albany office. A. I have been in charge of the Albany office since 1950, acted—was engineer in charge about a year and a half prior to that time.

• • • • •

—53—

• • • • •

Q. Did US Engineers make the arrangements for the removal of both vessels? A. Yes.

Q. That work was undertaken by the United States through the Corps of Engineers; is that right? A. That is right.

Q. You also removed the cargoes? A. We did.

• • • • •

Ambrose F. Brennan—for Frank A. Lowery—Cross

—55—

* * * * *

Cross Examination by Mr. Atkins:

Q. Mr. Brennan, you do have your file with you? A. Yes, sir.

—56—

Q. Would you be good enough to see if you can locate a telegram from Inland Survey Bureau, Inc. to yourself, dated September 28, 1953? A. I have it.

Q. I am going to ask you to read it into the record. A. This telegram is dated 1953, September 28, A.M., 11:46, it is sent apparently from New York and is addressed to Ambrose F. Brennan, Engineer in Charge, US Army Engineers, Room 322 Federal Building, Albany, New York. "Re: Barges Marion O'Neill and Mae Lowery sunk Albany. Based on our investigation we have concluded that it is not commercially expedient to enter upon any salvage operations with respect to the cargoes on each of the barges and therefore on authority of cargo underwriters we are taking no further steps to enter upon any attempted salvage operation with respect to these cargoes. Thanks for your fine cooperation and patient consideration. Inland Survey Bureau, Inc."

The Court: That is a nice compliment to yourself and your staff.

Mr. Taylor: May I say at this time that I move to strike out with respect to Bouchard as not being binding upon Bouchard this testimony.

—57—

We claim this cargo was salvageable, this is only self-serving declaration by a party that it couldn't be salvaged and was abandoned. This can't be binding on Bouchard. We claim this cargo could have been salvaged.

Ambrose F. Brennan—for Frank A. Lowery—Cross

The Court: Isn't the question whether it was salvaged?

Mr. Taylor: No, what its value was at that time, that is the question. We claim it had considerable value; they claim it was worthless—if we ever get to that point in the question—

The Court: I don't know; did they take it out of the river?

Mr. Taylor: No, they abandoned it to the Army Engineers in accordance with this telegram. What Mr. Brennan did with it I am not quite sure.

The Court: Can't we ask him about it? What happened to the cargo?

A. (Witness) We sold the cargo.

The Court: You sold the cargo?

The Witness: That's right.

By Mr. Atkins:

Q. You sold the cargo? A. That's right.

Q. Was it in a damaged condition? A. It was damaged.

Q. Do you know how much you received for the cargo? A. I do not recall the exact amount but we sold it after taking competitive bids for about ten cents a bushel, placed by us in purchasers' scows.

Q. And in the condition—it was placed in the purchasers' scows in the reconditioned manner or as it was when it came out of the scow? A. It was placed in the scow, in the purchasers' scow, just as it came out of the wreck.

• • • • •

—75—

* * * * *

ALEXANDER H. SCHNAPP, called as a witness in behalf of Frank A. Lowery, being first duly sworn, testified as follows:

Direct Examination by Mr. Heckman:

* * * * *

—78—

Q. Did you make an examination of the stern of the vessel? A. Yes, I did.

Q. And will you describe the stern of the vessel as you examined it on the days you were diving? A. Well, I went to the stern and the whole barge was all overflowing with wheat that was expanded from the water, and as I went to the stern in the No. 4 hold, let's call it No. 4 hold, by the stern, I believe they have four holes on the barges, I found parts of the cabin and the stern, and as I went further back the whole end of the barge was pushed into No. 4 hold with the bed and the bed springs pinned underneath, and the damage exceeded down to the middle of the barge with the side split open.

Q. How would you describe the stern of that vessel? A. Well, I could not put any lines on there, because there was nothing to put it onto, because it would pull right up.

* * * * *

—80—

Q. Now, in addition to the stern being pushed forward in the manner that you described, I believe you said that certain contents of the cabin were found forward of where the cabin was and in the hold forward of that; is that correct? A. Yes, a part of the top.

Alexander H. Schnapp—for Frank A. Lowery—Cross

Q. What part of the cabin furniture was it that you saw? A. Well, you could not see any furniture. That was all covered by grain. The grain formed a mound and pushed out over the side.

—81—

Q. Didn't you mention a mattress? A. Yes.

Q. Where did you find that mattress? A. I found it pinned underneath the stern, and the spring.

Q. And the spring, too? A. Yes, sir.

Q. Pinned underneath what part of the stern? A. It would have been, let's see, it would be the starboard side.

Q. Was it the upper part of the stern or the lower side? A. The upper part.

Q. The upper part? A. Yes.

Q. And what part of the stern had been pushed forward? A. The whole stern.

Mr. Heckman: That is all.

Cross Examination by Mr. Taylor:

• • • • •

—83—

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Q. And did you notice that the hatch covers had been forced up and the tarpaulins had been forced up? A. That's right.

Q. In other words, the expansion of the wheat had forced the hatch covers and the tarpaulins to come up?

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—84—

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Q. You say that she was overflowing with wheat at the stern? A. Well, all over, on the bow and on the sides.

There was quite a bit of wheat and, of course, the current carried quite a bit down stream.

Q. Did you notice especially the stern of the barge, that is, all the way down to the bottom? A. Well, I went down as far as the damage area and could not find any place to attach any lines and then I concentrated more on the bow.

Q. Was that because the wood was rotted or because it was broken? A. Because of the damage on the stern.

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—115—

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MELVILLE J. HORN called as a witness in behalf of Cargill, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Atkins:

Q. Where do you live, Mr. Horn? A. East Atlantic Beach, Nassau County, New York.

Q. What is your business? A. Surveying and adjusting marine claims.

Q. With what company? A. Inland Survey Bureau, Incorporated.

Q. Are you an officer of that company? A. Yes, sir; president.

Q. How long have you been with the company, since its organization? A. Yes, sir.

Q. How long has that been? A. I think 1927, 27 years.

Q. Tell me in general the business of the Inland Survey Bureau, perhaps a little more in detail, where you have offices and what you do and so forth? A. We have an office

—116—

in New York and an office in Buffalo, New York, and we examine damages for insurance companies, assess them

for repairs; we also adjust claims under marine insurance policies.

Q. And do you do any work in connection with your surveying vessels prior to their reception of cargoes? A. Yes.

Q. By the way, you have a Mr. Loeser with you? A. Mr. Wilfred N. Loeser, in our Buffalo office.

Q. In what capacity? A. He is the manager of that office.

Q. He is an officer of your company? A. Frankly I don't recall, I think he is a vice-president but I am not sure.

Q. You have been in court during the progress of this case? A. Yes, sir.

Q. Do you know the motor tug Frank Lowery and the barges mentioned as being involved in this collision? A. Yes, sir.

Q. How long have you known them? A. 27 years; Mr. Lowery didn't own all of those boats during that period.

Q. But you knew the barges? A. Yes.

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—316—

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EUGENE MEYER called as a witness in behalf of Bouchard, being first duly sworn, was examined and testified as follows:

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—319—

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Cross Examination by Mr. Heckman:

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—321—

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Q. The stern of the Marion O'Neill was pushed forward; wasn't it? A. It was badly crushed, I would say.

Q. It was badly crushed? A. Well, what I could see of it.

Q. What do you mean by badly crushed? A. Well, the cabin was smashed. It came up in pieces.

Q. How about the stern itself? A. I didn't see too much of the stern. We didn't raise her completely out of the water.

Q. Oh, I see. Did you raise the Mae Lowery completely out of water? A. No, sir. I raised it enough off the bottom to float it into shore.

Q. And was part of her deck always submerged? A. Well, at low tide her deck was pretty well out.

—322—

Q. And how about at high tide? A. It was pretty well submerged.

Q. I suppose the deck was covered with some slime? A. Not too bad.

Q. But there was some slime? A. Well, there is always slime on the water.

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—323—

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Redirect Examination by Mr. Taylor:

Q. Just one other question, Mr. Meyer. Am I right in thinking that it is your job to try to salvage anything on

—324—

these two vessels that had any value? A. Well, it is common practice to salvage anything rather than to throw it away.

Q. In other words, these vessels were abandoned to the government? A. That's right.

Q. And it was part of your job to salvage anything that was on those vessels? A. Yes, sir.

Q. Including cargo and otherwise? A. Yes, sir.

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—473—

WILLIAM R. BAGGER called as a witness in behalf of Bouchard, being first duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

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Q. Do you know the Inland Survey Bureau? A. Well, I know their staff, I have had occasion during the years to survey with them.

Q. Are they a recognized firm in the surveying business in New York? A. Yes, I think so.

Mr. Taylor: I object to this line of questioning, reputation isn't going to help them if they were negligent in this particular case.

—505—

The Court: Overruled; you may ask.

By Mr. Atkins:

Q. And do you know they have had experience in surveying barges of the type involved in this action for many years? A. Well, I know they have acted on behalf of underwriters for many years.

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Excerpts From Testimony Before the Commissioner

—23—

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MELVILLE J. HORN called as a witness in behalf of libellant, Cargill, Inc. being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Atkins:

—24—

Q. Mr. Horn, where do you live? A. Long Beach, Nassau County, New York.

Q. And what is—do you know the Inland Survey Bureau, Inc.? A. Yes, I know the Inland Survey Bureau, Inc.; I am president of that organization.

Q. And where is the Inland Survey Bureau, Inc. offices? A. 111 John St., New York City.

Q. What is the business of Inland Survey Bureau, Inc.? A. Marine surveyors and adjustors.

Q. How long have you been engaged in such business with Inland Survey Bureau, Inc.? A. Since about April, 1927 or '28.

Q. And previous to that time had you had any experience in surveying? A. Yes.

Q. Will you tell us over what period? A. The E. W. Holmes Co. was a predecessor company, and prior to that I did some work for marine insurance companies as an individual.

Q. Now it has heretofore been testified and is in the record upon the examination of one Mr. William Onderdonk that Appleton and Cox, Inc. as attorneys in fact for the interested underwriter or underwriters settled the loss under a customary loan receipt with Cargill, Inc.; now I

—25—

am asking you just yes or no whether you know Appleton and Cox, Inc. A. Yes.

Q. Were you brought into the picture following the collision between the tug BOUCHARD and its tow and the motor vessel FRANK LOWERY and her tow? I am asking if you were brought in? A. Yes.

Q. And by whom? A. Appleton and Cox.

Q. When? A. On the morning that this collision occurred.

Q. That would be September 25? A. September 25.

Q. 1953? A. Yes.

Q. Now— A. (Interrupting) Very early in the morning.

Q. For what purpose? A. For the purpose of ascertaining if it was possible to economically salvage the cargo.

Q. Now what steps did you take, what did you perform in connection with such service? A. I telephoned to Mr. Hochberg of Millhurst Mills, Freehold, New Jersey and to Mr. Ormsby of the Soybean Products Co. in Oswego and asked both of those gentlemen to proceed immediately

to Albany and meet one of our men, a Mr. Hylind and make us an offer for the grain.

Q. Who is Mr. Hylind? A. Mr. Hylind is an employee of the Inland Survey Bureau.

Q. And on what date did you do the telephoning that you have referred to? A. Shortly after 9 a.m. September 25th.

Q. Now thereafter did you keep in touch with the situation here in Albany? A. Yes.

Q. By what means? A. Telephone.

Q. And what did you do and what did you ascertain? A. I requested Ormsby and Hochberg to come to Albany, look over the situation, meet Mr. Hylind and Cargill, Inc. and make an offer for this grain under the water, as is, pointing out to both these gentlemen that the War Department would not permit us or anyone to remove—

Mr. Taylor: (Interrupting) I object to this, it is not responsive.

A. (The witness) That is what I did.

Mr. Taylor: As to the War Department.

The Commissioner: Repeat the question.

(The Reporter read back the last question.)

Mr. Taylor: I move to strike it out starting with

—27—

the part about the War Department.

The Commissioner: I will sustain the objection and ask that that part referring to the War Department be stricken out and ask Mr. Atkins if he would rephrase his question.

Mr. Atkins: Well, only that part is stricken out?

The Commissioner: Yes.

Mr. Atkins: I have no objection to that being stricken out.

By Mr. Atkins:

Q. You have mentioned telephone conversations, did you contact the War Department in New York or did they contact you? A. They contacted us.

Q. And will you state the substance of any conversations held with the War Department in New York.

Mr. Taylor: Well, I object to what the—I assume he is referring to the Engineers right here in Albany.

Mr. Atkins: No, in New York.

Mr. Taylor: I object to what conversation was had with a third party, I think there is better proof.

Mr. Atkins: That is part of it, Mr. Commissioner, our position is and the libellant's position is first that

the testimony in the main case shows that Appleton
—28—
and Cox, Inc. under a loan receipt settled this loss with Cargill, Inc. I don't have to go into that and the issue here is whether or not Cargill, Inc. and/or Appleton and Cox, Inc. took appropriate measures to minimize the loss and my submission is that engaging a well known firm of surveyors to resolve that question for them was perfectly appropriate and that Mr. Horn, the witness, may testify what measures he took, and I could even go so far as to this, I don't think I have to, but whether or not Mr. Horn, the Inland Survey Bureau, were justified in a recommendation of abandonment; that if the interests of Cargill relied upon such information, that they then had a perfect right to accept the recommendation and to abandon it.

The Commissioner: Repeat the last question.

(The reporter read back the last question.)

The Commissioner: I will overrule the objection subject to Mr. Taylor's objection on the record; go ahead.

A. (The witness) The War Department—

By Mr. Atkins:

Q. If you can, name the person. A. Captain Westerfeld informed our office.

Q. Do you know who he is? A. Captain Westerfeld of the U. S. Army Engineers in New York telephoned our office which is a customary procedure in all of these sinkings,
—29—
and said: "What are you going to do with the cargo at

Albany, because the wrecks are a menace to navigation?" And we told Mr. Westerfeld that we were in touch with Mr. Brennan and that Mr. Brennan desired to blow up the wrecks and we had asked Mr. Brennan to give us until Monday morning.

Q. What date was this conversation? A. The day of the 25th—to give us until Monday morning to try to find some method whereby we could salvage the cargo economically, reasonably; we then telephoned these men to come down here and look at the grain. During that day or the following day Mr. Hylind telephoned me and said the men were here—

Mr. Taylor: (Interrupting) I object to what Mr. Hylind said. Is Mr. Hylind an employee of yours?

A. Yes, and he works under my direction and he comes to me with the proposition for me to make the decision.

The Commissioner: What is the ground for your objection?

Mr. Taylor: Hearsay. Mr. Hylind can be produced here without any difficulty, he is one of their employees.

The Commissioner: I sustain that objection on the ground it is hearsay. Is there any reason why you can't produce Mr. Hylind?

—30—

The Witness: Both of these men gave me the office to—

Mr. Atkins: (Interrupting) Mr. Horn has testified he is the President of Inland Survey Bureau, he was engaged by Cargill interests to look into the feasibility of salvaging the cargo, minimizing the

loss. Mr. Hylind is part of his organization. To do that he sent Mr. Hylind to Albany and he received reports from Mr. Hylind which was in the ordinary course of his business and it is a situation where it is not the question of—the question at issue is not the question of fact relating to the circumstances surrounding the collision, it is a question of fact as to the feasibility of determining whether any salvage could be economically undertaken.

The Commissioner: Did these gentlemen to whom Mr. Horn is referring testify on the main trial?

Mr. Taylor: No, they did not.

Mr. Atkins: No, Mr. Horn testified in the main trial.

The Commissioner: And these gentlemen to whom he is referring as having the conversations with did not testify in the main trial.

Mr. Atkins: No, they did not testify in the main trial but if the Commissioner objects to the question

—I mean, excuse me, if the Commissioner overrules the objection I must enter my exception to the ruling.

The Commissioner: The objection was as I understand it as to the conversation Mr. Horn had with Mr. Hylind.

Mr. Atkins: One of his men, and what induced him to act upon it.

The Commissioner: I would sustain the objection as to hearsay and say if Mr. Horn could testify as to what he actually did pursuant to those telephone conversations that would be all right.

Mr. Taylor: I have no objection to that.

By Mr. Atkins:

Q. All right, so you did hear from Mr.—you sent Mr. Hylind to Albany? A. On the—

Q. (Interrupting) Just yes or no. A. Yes.

Q. And you did receive reports from Mr. Hylind? A. Yes, and—

Q. (Interrupting) That is enough right there. Now acting on reports that you received from Mr. Hylind what did you do in chronological order? A. On September 26th, the day following, Mr. Hylind telephoned me that Hochberg was on his way, that he had heard from Ormsby's repre-

sentative here on that afternoon, Saturday afternoon. Hochberg confirmed to me over the telephone that he would pay two thousand dollars for the cargo as is and plus one-half of any profits if he made any profits. Later in that day Mr. Ormsby said he would pay two thousand dollars flat, no profits. I told Mr. Hylind to tell this to Mr. Bouchard's surveyors and attorneys which he says he did. Now I am sorry, this is hearsay, Mr. Hylind came back to New York the following day and I have his notes here.

Q. You talked with Mr. Hyland in New York? A. I talked to him and made these notes right there and then and he says— .

Mr. Taylor: (Interrupting) Is there any reason why we can't get Mr. Hylind?

The Witness: Yes, beg your pardon, go ahead, yes, we can produce Mr. Hylind.

Mr. Atkins: It would encumber—I have no objection to producing Mr. Hylind but it will incur additional expense.

Mr. Taylor: We will take that risk.

The Commissioner: As I understand it you say you made notes pursuant to the conversations you had with Mr. Hylind, the information in those are actually of your own knowledge.

The Witness: Yes.

—33—

The Commissioner: Will you testify as to your own knowledge?

Mr. Taylor: I object in so far as they are based on what somebody else told him.

The Commissioner: Go ahead Mr. Horn.

The Witness: We did not accept either one of these offers because I was told that Mr. Bouchard's surveyors and attorneys—

Mr. Taylor: I object to that.

The Witness: That is the reason why we didn't take the bid. On Monday morning—

The Commissioner: Your objection is on the record as to hearsay. I am overruling the objection and permitting him to testify.

Mr. Taylor: That part where he said he heard somebody say Bouchard wouldn't accept this, it is both irrelevant and hearsay, we don't know where it originated.

The Commissioner: Are you moving to strike that part of the testimony from where he said he heard?

Mr. Taylor: Yes.

The Commissioner: I am striking that part from where he said he heard.

The Witness: On the following Monday morning, Captain Westerfeld—

Melville J. Horn—for Cargill—Direct

By Mr. Atkins:

—34—

Q. That would be September 28th? A. Whatever it was, Captain Westerfeld again telephoned our office and said something would have to be done, that the Army Engineers felt they had waited long enough and would we furnish the Army Engineers with the names of the people who had offered to buy this cargo.

Q. May I interject and ask whether by that time you had been informed by Mr. Westerfeld, I will put it on impersonally, of a collision with the tug Kehoe and one of the barges? A. No, I don't recall that he did, all he said is they were a menace and they had to be removed, they had to start that day.

Mr. Atkins: It is part of the record, I take it it can be conceded that the tug Kehoe did—

Mr. Taylor: (Interrupting) That is right in the record, Mr. Atkins.

Mr. Atkins: It is in the opinion.

Mr. Taylor: That I believe was before the wrecks were marked by anybody.

Mr. Atkins: Yes.

By Mr. Atkins:

Q. Go ahead. A. We gave Mr. Brennan in Albany and Mr. Westerfeld names of the two people who had made offers on the cargo and I think about noon that day we

—35—

telegraphed to Mr. Brennan, Army Engineer in Albany, that we did not believe it commercially expedient to pursue the matter any further and the two bids as far as any records show did make some offer to the Army Engineers.

Q. Now, let's assume, Mr. Horn, that you—did you consider the feasibility of engaging salvage equipment to endeavor to salve some cargo? A. We did and we conferred with a Mr. Ezmark who had some equipment down the river, but Mr. Ezmark was interested only in removing the hulls for a sum of money and he finally on that Monday told us that he would not enter into any arrangement to raise the cargo and the hulls, he said it couldn't be done economically, the money wasn't there, the value wasn't there.

Q. Now do you know or had you known the barges MAE LOWERY and MARION O'NEIL? A. Yes.

Q. Over a period of time? A. Yes.

Q. And for how long? A. Twenty odd years.

Q. Had your organization had experience on similar barges loaded with grain sinking in the New York State

Barge Canal? A. Yes, in the Hudson River.

Q. In the Hudson River, now based on your experience and your information derived through Mr. Hylind, have you an opinion as to whether or not it could have been economically feasible to engage salvage equipment to endeavor to salve cargo on the two barges mentioned, not on a no cure, no pay basis but on a straight salvage basis? A. No, we did not.

Mr. Taylor: Excuse me—

The Commissioner: The question was, have you an opinion.

The Witness: Yes, I have an opinion.

By Mr. Atkins:

Q. Now what is your opinion?

Mr. Taylor: Now I object to that, the hypothetical question does not contain any of the facts in connection with these particular barges, there isn't enough facts upon which he can base a reasonable opinion; I don't think he saw the barges, I don't think he was present and on the further ground we also object to the question—

Mr. Atkins: (Interrupting) I am going to ask the Commissioner subject to the objection—

The Commissioner: Mr. Horn is qualified as an expert, you have asked him whether as such he has

an opinion. He has testified he has an opinion. If you want to phrase a hypothetical question encompassing within the facts that would qualify him as an expert to testify as to the happening of this accident of which this libel concerns, you may do so.

Mr. Taylor: I also object on the ground he has not been qualified as an expert on salvage work, I don't know what he knows about salvage, dredges, derricks, operations of tugs, all those things that go into the operation of a salvage of this kind.

The Commissioner: That objection I will overrule and you may ask your question, Mr. Atkins.

By Mr. Atkins:

Q. Mr. Horn, assuming that at a point 800 to 1100 feet beyond the Dunn Bridge, the Dunn Memorial Bridge, South, a collision had occurred between a Bouchard tow which struck the stern of the barge Marion O'Neil and that the barge sank almost immediately; that the time was two twenty a. m. Eastern daylight saving time and that within a range of ten to fifteen minutes despite some efforts of the Captain to pump her the MAE LOWERY also sank; and

assume that about 4 a. m. the tug CLAYTON P. KEHOE—and I interrupt myself and say do you know the tug KEHOE? A. I know the tug. Yes.

Q. Came down the river from a dock in the City of

—38—

Albany and ran upon the wreck of the MAE LOWERY; that the collision occurred on September 25, 1953 on a Friday; now assuming that you were requested by cargo interests to explore the possibilities of economically salvaging any of the cargo in the barges MAE LOWERY and MARION O'NEIL, you may also assume that the War Department had advised you that the barges were a menace to navigation and that they contemplated blowing up the barges in order to remove such obstruction, now based on your familiarity with similar salvage operations that would be called upon under the circumstances of such losses, considering the value of wheat, considering the time elements as to the effect of the waters of the Hudson River, what effect they might have on the respective cargoes and the values of such wheat if removed, the market price of such wheat which let us say on September 28 on a Monday had been in the River since Friday, Saturday, Sunday and part of Monday, having in mind the values charged by salvors, actual salvors for their equipment, have you an opinion as to whether or not it would have been economically sound to engage salvors to perform services on a straight pay basis? A. No.

Mr. Taylor: I object to the question on the ground it doesn't contain all the factors involved and leaves out many of them.

The Commissioner: Would you state the facts that

—39—

you felt are left out.

Mr. Taylor: Some of them I think of at the moment are that the cargo was intact at the time for some time after the collision; that the barges were in shallow water; they were within 150 feet of the shore; that the collision occurred on the early morning of September 25, 1953; that the War Department —that is, there is no evidence as to how long the War Department would have granted anybody willing to remove these barges and their cargo and other factors that I can't think of at the moment.

The Commissioner: I will overrule the objection and permit Mr. Horn's answer to the hypothetical question whether or not he has an opinion.

A. (The Witness) I have an opinion.

By Mr. Atkins:

Q. And what is your opinion? A. That it would not be advisable to spend the money to attempt to salvage the cargo. My opinion is that the cargo would not have been worth the cost of salvaging it because we would have to remove the hulls and that alone we estimate would cost $9,000.00.

Q. Why would you have to remove the hulls? A. That is what the Army Engineers makes us do and I personally know that, I have removed cargoes and removed the hulls

to get rid of them.

Q. Could the cargo—

Mr. Taylor: (Interrupting) May I register an objection? I move to strike it out because he says he knows that is what the Army Engineers make him

do, I think the best judges of that are the Army Engineers.

The Commissioner: Unless there is a foundation laid for that question I will sustain the objection.

By Mr. Atkins:

Q. My foundation will be this. Mr. Horn, I will ask you an intermediate question, would there be salvage equipment in Albany available on a straight pay basis to work on salvaging the cargo apart from the hulls? A. The only equipment available in the Port of Albany at that time belonged to the Army Engineers and Mr. Brennan said he would not allow us to use it.

Q. Is there any equipment in the vicinity of Albany? A. There was equipment down the River belonging to Mr. Connie Ezmark.

Q. When you say down the River can you be a little more specific? A. I will have to look through my notes but in any event when Mr. Ezmark considered the thing he said that he was not interested, that it would cost too much.

Q. Could he have been engaged? A. He could have been

engaged, yes.

Q. And have you any idea— A. (Interrupting) But the cost would have been too much.

Q. Have you in similar situations—I mean sunken barges with grain—had dealings with the Army Engineers? A. Yes.

Q. Can you state whether or not it is a rule or condition of the Army Engineers that where barges constitute a menace to navigation salvage operations can be undertaken solely to raise cargo from a sunken barge or barges leaving the barges without raising the barges?

Mr. Taylor: I object to this.

Mr. Atkins: If he can.

Mr. Taylor: I don't think Mr. Horn is qualified to tell us the sum and substance of the rules and regulations of the Army Engineers. If there are written rules we can get them and if they are rules prescribed by somebody informally I think the Engineers had better testify on that subject.

The Commissioner: I feel that if Mr. Horn can testify by citing the instances of his personal experiences with the Army Engineers and base his conclusions on those experiences and not as he has done so far on a personal conclusion I will permit it; but as of now I will sustain the objection of Mr. Taylor.

—42—

By Mr. Atkins:

Q. Can you cite it personally? A. Yes.

Q. All right, state such experiences. A. In 1942 the barge operated by Hedger sank off the bulkhead line of the aluminum plant in Elwater, New Jersey and in order to remove the cargo we had to raise the hull with it and that was direct orders from the Army Engineers. We had a coal barge at the National Sugar Plant on the East River and that barge we brought up in pieces and had it destroyed over at Staten Island but in every one of these instances we have never been allowed to touch the cargo unless we agreed to dispose of the wreck.

Q. Now may I ask you when Mr. Westerfeld in your conversation with him, was anything mentioned with reference to the raising of the barges?

Mr. Taylor: I object to this.

Q. (Mr. Atkins) or of the cargo, apart from the barges, I will add that.

Mr. Taylor: It is pure hearsay.

The Commissioner: He is asking him whether or not there was anything asked, not what was said; I will overrule it.

A. (The Witness) Yes, Captain Westerfeld—

The Commissioner: Just answer the question.

—43—

Read the question.

(The Reporter repeated the last question as above recorded.)

A. (The Witness) Yes.

By Mr. Atkins:

Q. Now will you say what Mr. Westerfeld said to you in such conversation.

Mr. Taylor: I object to what Mr. Westerfeld said to him.

Mr. Atkins: Mr. Commissioner, I am following out the Commissioner's suggestion that if he did have—

The Commissioner: My suggestion was as to his personal experiences with the U. S. Army Engineers. Who is Mr. Westerfeld?

Mr. Atkins: Captain Westerfeld of the Army Engineers in New York.

Mr. Taylor: If we are going to have testimony on

that, let's have the man himself, this is an important enough point.

Mr. Atkins: If the Commissioner wants to call him I have no objection.

Mr. Taylor: This witness' recollection of what a third person said is not satisfactory, they should have the person who said it.

Mr. Atkins: It may not be satisfactory to you.

—44—

The Commissioner: I will overrule his objection and cite Mr. Taylor's objection on the record and permit Mr. Horn to answer, not in so far as what he said, what you did and with relation to what he said.

Mr. Atkins: Mr. Commissioner, we are directing our attention to whether cargo might be salvaged leaving the wrecks untouched and the testimony as I understand it is that it was against the rules or regulations of the War Department to permit such an operation.

The Commissioner: I said I would permit Mr. Horn to answer; go ahead Mr. Horn.

A. (The Witness) Westerfeld said—

Mr. Taylor: Did I understand you to say he could testify as to what he did?

A. (The Witness) What I did, I told Captain Westerfeld that we were not going to salvage the cargoes and the hulls and I confirmed the part about the cargo in the telegram to Mr. Brennan.

Q. Which is in evidence. A. At Westerfeld's request.

Q. Did you render a debit for your services? A. Yes.

Melville J. Horn—for Cargill—Direct

Q. And could you tell us the amount of your debit? A. Well, $527.67 to Appleton and Cox, $527.67.

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—48—

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Q. Mr. Horn, in your testimony this morning you mentioned getting in touch with Millhurst Mills, you recall

—49—

that? A. Yes.

Q. And that Millhurst Mills had made an offer to you to purchase the grain in the barges as is, where is. A. Yes.

Q. You did not accept the offer? A. We did not accept it because—

Q. (Interrupting) You did not accept it. A. We couldn't accept it.

Q. All right, did you thereafter hear from Millhurst Mills? A. Yes.

Q. Now I hand you a telegram dated September 28th, 1953 and ask you to read the telegram and ask you whether you received that telegram? A. At about ten o'clock in the morning of Monday, September 28 we received a telegram from Millhurst Mills.

Q. Will you read the telegram.

Mr. Taylor: May I see it before you read it?

The Commissioner: Would you care to have it marked? Mark it for identification if you will.

(Thereupon the telegram referred to was marked libellant's Exhibit No. 1 for identification.)

Mr. Taylor: I object to it.

Mr. Ryan: It is only marked for identification.
Mr. Taylor: I object to his reading it.

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By Mr. Atkins:

Q. Now I am asking you to read the telegram marked for identification Exhibit No. 1 for libellant into the record.

Mr. Taylor: I object to the reading, it is hearsay.

By Mr. Atkins:

Q. You received the telegram? A. May I see it please?

The Commissioner: May I see it also?

(The telegram referred to was handed to the Commissioner.)

By Mr. Atkins:

Q. Read it.

Mr. Taylor: I object to it on the ground it is hearsay, I have no objection to his testifying what he did after he received the telegram.

The Commissioner: Do you know, Mr. Horn, the contents of the telegram without referring to it?

The Witness: Generally, yes.

The Commissioner: Then Mr. Taylor's objection as to the admissibility of the telegram itself I will sustain.

By Mr. Atkins:

Q. Will you tell us in general the contents of the telegram.

—51—

Mr. Taylor: I object to the content; I have no objection to his saying what he did after receiving it.

A. (The Witness) What I did was based on what he did, what I did was based on this telegram, one of them.

The Commissioner: Do you know now, Mr. Horn, generally the substance of the telegram?

A. (The Witness) Yes, I knew that morning.

The Commissioner: I will overrule the last objection.

A. (The Witness) He said in substance he was withdrawing the bid of two thousand dollars plus splitting the profits, that was on Monday morning.

By Mr. Atkins:

Q. Following the receipt of the telegram what did you do? A. We gave up and telegraphed Mr. Brennan that we were abandoning it.

Mr. Atkins: That's all.

Cross Examination by Mr. Taylor:

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—54—

Q. All right, and during this time between the accident and the time you advised the Army Engineers you were abandoning the cargo did you come to Albany at all? A. No sir.

Q. You were in New York all this time? A. Yes.

Q. And your decisions were based on the basis of reports from whom? A. Mr. Hylind, Mr. Hochberg, Mr. Ormsby, Mr. Hendrickson.

Q. Now Mr. Hochberg, he was a man— A. (Interrupting) Was a Millhurst—he is the Millhurst mill man that sent that telegram.

Q. He is the man interested in buying the cargo. A. He was up until that morning.

Q. Who got in touch with Mr. Ormsby? A. I did, I called up his office in Oswego.

Q. And asked him for a bid? A. He acted very quickly, he called a Mr. Clate here in New York.

Q. As far as you know he came to Albany? A. Subsequently, he subsequently looked over the situation.

Q. He subsequently looked over the situation as far as you know? A. Yes.

Q. Then made you an offer? A. Yes, and he is an experienced salvage buyer for many years.

Q. What did you do in the way of hiring equipment to salvage the cargo? A. We discussed the matter with Mr. Connie Ezmark and we come up with a figure around twelve or thirteen thousand dollars which absolutely I know from experience was more than that cargo could be sold for.

Mr. Taylor: I move to strike out the part that is not responsive.

Mr. Atkins: You asked the question.

The Commissioner: Repeat the last question.

(The Reporter read back the last question.)

Mr. Taylor: I particularly object to the part that he says "I knew it was more than it could be sold for."

The Witness: I had to arrive at that question.

Mr. Taylor: I move to strike out the part that is stated as from his experience.

The Commissioner: That part that recites from his own experience may go out. Now will you read the question again.

(The Reporter read back the question referred to.)

Mr. Atkins: Mr. Commissioner, I must take exception to your ruling. Here you have an experienced man in the salvage of grain and he is here primarily

because respondent Bouchard contended that something might have been done to salve the cargo.

The Commissioner: I concede that point, I am merely trying to confine his answers to the questions asked.

Mr. Atkins: That is all right.

By Mr. Taylor:

Q. What other owners of equipment did you consult?

Mr. Atkins: If any.

A. We conferred with Mr. Ezmark.

By Mr. Taylor:

Q. I asked you who else did you consult with? A. No one else but Mr. Ezmark except the Army Engineers, Mr. Brennan.

Q. What type of equipment did Mr. Ezmark have? A. He had a derrick and he has a diver, he has pumps.

Melville J. Horn—for Cargill—Cross

Q. Did he give you a price? A. No sir.

Q. As to each of these items of equipment? A. No sir.

Q. He just gave you this overall price? A. He did not give us any price, he examined the situation and he said he was only interested in picking up the hulls.

Q. Was he interested—strike that out. Did he give you any idea of what it would cost to take the cargo out of

—57—

hulls? A. He did not.

Q. Did you ask him? A. No.

Q. Did you ask anybody else how much it would cost to take the cargo out of the hulls? A. No, because from 25 years experience we arrived at our own figure.

Mr. Taylor: I move to strike out all but the "no".
The Commissioner: So stricken.

By Mr. Taylor:

Q. What did you think, what type of equipment did you think was necessary to take the cargo out of those two holds? A. Well you need at least two lighter barges, a derrick barge, a diver, pumps, possibly some clam shells.

Q. What was the derrick barge for? A. To get alongside to hold the gear if you wanted to pump the grain or dig it.

Q. What was the pump for? A. To pump the grain.

Q. And what type of pump would it require? A. I don't see—a pump.

Q. What type of pump? A.–A pump that pumps water.

—58—

Q. You would use any ordinary water pump to pump? A. No, you would use a large one.

Q. About what size? A. About four inches.

Melville J. Horn—for Cargill—Cross

Q. How long would it take a four inch pump? A. I don't know because we didn't do the job.

Q. From your experience how long would you say? A. I would have to go to my records.

Q. You can't tell us off hand? A. No, because it varies.

Q. You can't tell us how long it would take a four inch pump to pump the cargo out of either of these barges? A. No, we didn't know how much cargo was in it.

Mr. Atkins: I am objecting to this question on the basis that the time is not specified, that it does not take into consideration cargo that might have been washed away from the barge and there is not a specific quantity of grain mentioned.

Mr. Taylor: Mr. Atkins, I am sure if this witness doesn't understand the question he will say so.

Mr. Atkins: I am still objecting.

By Mr. Taylor:

Q. You don't know—

The Commissioner: Wait a minute, read the question.

(The Reporter read back the last question.)

The Commissioner: You are objecting on the ground—

Mr. Atkins: We don't know how much cargo there was on the barges on that particular day which is not mentioned in the testimony in the main case, much of the cargo washed away.

The Commissioner: I think under those circum-

stances the witness can answer yes or no, he does or doesn't know.

The Witness: I wouldn't know.

By Mr. Taylor:

Q. Assuming she had her full cargo how long would it take? A. We had one barge it took four days and we didn't get all the cargo.

Q. To pump out how much grain? A. About 15,000 bushels.

Q. How long would it take a six inch to pump out 19,000 bushels? A. I don't know, I can go back to New York and I can dig up records and tell you how long it takes.

Q. What was the function of the derrick barge in this operation? A. To carry the pumps and also to operate

a bucket if that would help.

Q. Now— A. (Interrupting) The bucket to dig the ground.

Q. If it would take one four inch pump to pump out the grain, all of the grain in one of these barges, I take it it would take two four inch pumps half that time. A. They vary, you would be surprised how they vary.

Q. What varies? A. You have a situation where wood in between—the diver has to go down and place the suction, the suction blocks up, tidal waters sometimes interfere, there isn't two of them alike, that I can think of.

Q. And of course you don't know what the situation was with these two barges? A. All I need is what people tell me, I knew then the stern was going.

Q. Presumably two pumps could do the work twice as fast as one pump? A. Not necessarily because the diver couldn't handle the two pumps, you have to have a man to keep the suction in the grain.

Q. You could have two divers? A. Yes.

Q. Two divers and two pumps could do it twice as fast? A. I don't know, I wouldn't hazard a guess; we have made

—61—

money where everybody thought we would lose it.

Q. You can't tell us? A. No one can tell you.

Q. All right and you can't tell us how fast those two barges could have been pumped out? A. No, and I say no one could. I think the Army Engineers could tell you because they went out and raised them anyhow.

Q. What is your recollection of the price of processed wheat—strike that out. Do you know what wheat that had been wet and then dried was selling for in September 1953? A. You might possibly get as much as a feed price for it but I would have no recollection of that.

Q. What was the feed price in September 1953? A. I don't recall.

Q. How can you tell us whether it was worthwhile salvaging these barges? A. After you do it for twenty-five years—

Q. (Interrupting) Please just answer my question, if you don't know what the feed price was in September 1953— A. (Interrupting) Because we estimated that it would cost us not less than $12,000.00.

Q. What I asked you—

Mr. Atkins: (Interrupting) Wait a minute.

The Witness: (Interrupting) We estimated it wouldn't cost us less than $12,000.00 to get the grain

—62—

out of these barges and that would be wet grain and very wet, it would have lost much of its gluten, which is the real value in wheat. We figured that if we did get it out of the boats wet, we might get ten cents a

bushel in its wet condition, but $12,000.00 would be 120,000 bushel.

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Q. How deep did you figure these barges were under the water? A. That doesn't make any difference, the grain is just as wet one foot under water as 100 foot.

Q. Is it just as easy to pump cargo out? A. No, beyond 30 feet it becomes difficult.

Q. And it is just as easy at 30 feet as it is when it is close to the surface? A. Beyond that would be bad.

Q. How deep did you figure this cargo was? A. These barges I figure were about 18 to 20 feet at the most, the bottom of the cargo.

Q. And the top of the cargo, how far did you figure that was? A. I imagine that would be about 5 feet, but the top washes out so there was no cargo on the top.

Q. Now this chap Ormsby, the man that offered to buy the wheat from you, is he in the salvage business of salvaging wheat? A. Yes he does, he buys it under water and hires equipment and digs it out.

—65—

Q. And have you any idea of what profit they expect to make? A. No, I haven't.

Q. We can presume they expect to make a pretty large profit in this situation? A. I know they lose money sometimes, they always tell us when they lose but they don't tell us when they win.

Q. The only equipment that you know that was in this area was owned by this man Ezmark? A. And Mr. Brennan and the Army Engineers.

Melville J. Horn—for Cargill—Cross

Q. Now I would just like to get a little more detail as to exactly what equipment you thought would be required to do the job of taking the cargo out. A. Of both these barges, lighter barge.

Q. How many barges? A. Two lighter barges.

Q. And what else? A. That is barges to hold the wet grain.

Q. Deck scows or something of that type? A. No, deep barges.

Q. Deep barges? A. That would hold the wet grain.

Q. What else did you require? A. Small derrick barge or scow with a derrick capable of holding the pumps, capable of operating a clam bucket.

—66—

Q. How much would it cost for two lighter barges per day? A. That all depends where you get them.

Q. What is the range of price? A. Well let me see if I have some notes here, considering the fact they get very dirty they probably cost—if you could get them—that was another difficulty, $50.00 a day is what we figured on or what was quoted.

Q. What would a small derrick cost? A. I think Mr. Ezmark or somebody gave us a price, that would be about $100.00 a day plus towing.

Q. Have you any idea of the towing charge? A. No, we made a rough estimate of $12,900.00.

Q. Of the entire operation? A. Not including cleaning it out.

Q. Mr. Horn, I am not asking you that.

Mr. Atkins: Wait a minute. Mr. Commissioner, I am asking what the towing would be.

The Commissioner: Are you objecting, Mr. Atkins?

Melville J. Horn—for Cargill—Cross

Mr. Atkins: I am objecting to not permitting him to answer the question.

By Mr. Taylor:

Q. The question I have is did you know how much the towing charges would be in connection with the small derrick? A. No, just a rough estimate.

—67—

Q. How many pumps would be required to do this work? A. I would say two would be better than one.

Q. What size? A. Four to six.

Q. Inches? A. Yes.

Q. And those are the same type of pump used for pumping water? A. Yes.

Q. Do you know what the rental hire per day for a six inch pump is? A. No, I have a record though.

Q. Is that all the equipment you would require to take the cargo out of both of those barges?

Mr. Atkins: Now I am going to enter this objection just for the sake of the record that all of the questions relate solely to taking the cargo out of the barges.

Mr. Taylor: That is all I am interested in at the moment.

Mr. Atkins: And that is all he is interested in, whereas the testimony has been that such an operation could not be performed, it would be contrary to the regulations or they could not secure the permission of the Army Engineers to conduct such an opera-

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tion unless it carried with it the removal of the barges.

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The Commissioner: Mr. Horn, you have testified that so far it would require two lighter barges, a small derrick barge and two pumps from four to six inches. The question is is that all you require.

The Witness: No.

By Mr. Taylor:

Q. What other equipment would you require? A. We would need—in the first place we would have to move the equipment to the scene of the wreck.

Q. The two lighter barges, the derrick and pumps? A. Yes.

Q. All right. A. Then we would have to have the tugs stand by to shift that lighter barge as they required; then we would have to have anchors to anchor the damaged barges which would certainly come up as soon as we started taking that cargo out; then we would have to have a tug tow the remains up here beyond Menands Bridge, was the place we figured we could drop them.

Q. And do you know what the cost per day of a tug to

—70—

do this work is? A. No, I didn't go into it, I estimated $12,900.00.

Mr. Taylor: I move to strike out for the fourth time—

Mr. Atkins: (Interrupting) I think it is a fair answer.

By Mr. Taylor:

Q. You don't know how much a tug would cost a day? A. Yes, around four hundred fifty to one thousand dollars a day.

Melville J. Horn—for Cargill—Cross

Q. Can you give us an estimate, what is your estimate—strike that out. What is your estimate of how long it would take two six inch pumps— A. (Interrupting) I never estimated it.

The Commissioner: Wait a minute, let him finish the question.

By Mr. Taylor:

Q. What is your estimate of how long it would take two six inch pumps to unload the cargo from those two barges if the entire cargo was intact? A. Based on previous experience it would run from four days to six days depending on weather and tide.

Q. For both barges? A. For one barge.

Q. Four to six days for both barges? A. It took six days for one barge—

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The Commissioner: Four to six days for one barge?

The Witness: Yes.

By Mr. Taylor:

Q. Now then after the barges were lightened they would float, is that correct? A. Yes, they do, they will float away.

Q. Then you had thought after they had floated you would take them where? A. Up to Menands, up above the Menands bridge.

Q. And dispose of them there? A. Yes, with the approval of the Army Engineers.

Q. And in that place they would not be a menace to navigation? A. That is what the theory was then.

Q. How far is the Menands Bridge from here? A. Up here about four or five miles.

Q. When you were talking of a price—strike it out. Can you tell us what you could get for wet wheat? A. If we raised it and got it out of the water we certainly could figure ten cents a bushel.

Q. That would be to whom? A. To who what?

Q. To what type of person, would a farmer buy that? A. No, it would have to be to a man who had a drier.

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Q. I see, what kind of driers do Cargill have? A. They have low moisture driers.

Q. At their home plant? A. Yes, that is all the business requires.

Q. And how many of those driers do they have? A. I don't know but they cannot handle that kind of wheat, we tried it.

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Q. Is it possible that some of this wheat could come out dry with a pump? A. No.

Q. Well, wouldn't the pump go down into the hold? A. That's right.

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Q. Doesn't the wheat in the center remain dry? A. No sir.

Q. What is your experience? A. Because when you pump off the wet wheat the water gets to every part of your grain, it swells, it floats, it splits the bottom.

Q. You put the hose down into the dry wheat, isn't that

so? A. There is no dry wheat, the first part that you get with your pump is wheat right off the top, you have got to

—75—

pump a certain amount of water to act as a conveyor for the wheat.

Q. Supposing the wheat is above the water, suppose it is awash. A. I don't know this wasn't awash.

Q. You don't know, do you? A. I certainly do, I certainly trust the men that gave me the facts that the wheat was under water.

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Q. Anyway as far as you know everything was submerged at all times? A. Yes sir.

Q. And that is the basis of your estimate, is that so? A. Yes.

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Q. Can you help us on this, Mr. Horn? If the wheat

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was removed in six hours, what percentage of moisture would the wheat have? Can you give us some idea on that? A. About 30%, at least 30%.

Q. And if it was removed in 12 hours? A. It wouldn't make much difference, it reaches a saturation point.

Q. And that saturation point— A. (Interrupting) Is around 30 or 35%.

Q. And it would be practically the same after a few days too? A. No, then it begins to break open and gets mushy, you haven't got any kernels left.

Q. That is the part that is in contact with the water? A. Yes.

Q. And the entire part— A. (Interrupting) It goes right

through and expands and the gluten comes out in the form of—they call it milk.

Q. What did you estimate could be removed from these two barges? A. I didn't think we would get more than half of it.

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Redirect Examination by Mr. Atkins:

Q. When you stated in answer to one of Mr. Taylor's questions that not more than half of the grain could be removed in salvage operations, you had reference to both

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barges? A. Both barges, considering it wouldn't start until the next week.

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Q. So that when you considered that not more than half of the grain could be removed, did you consider that not more than 20,000 bushels could be saved? A. We couldn't get $12,000.00 worth of grain out of it, what we got wouldn't bring us back our $12,000.00.

Mr. Atkins: That's all.

Recross Examination by Mr. Taylor:

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Q. Mr. Horn were there any other driers in the area that could have dried this wheat, that you know of? A. No, there were driers but they weren't big enough, the

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grain would be so rotted.

Q. Where? A. There is a fellow in Troy has a small drier, then there was a fellow up here—

Mr. Atkins: (Interrupting) If you remember the name, give it.

A. No, I don't because they can't handle—yes, his name is Vic.

By Mr. Taylor:

Q. If you just tell us where it was? A. There is a little malt house up here in Albany.

Q. What is his capacity? A. It is very small, it is not enough.

Q. Have you any idea of the capacity? A. No, it wasn't fast enough, we need a drier something like the New York State Barge Canal in New York to dry it fast.

Q. How fast could they dry it, the New York State Barge Canal? A. That will dry, I think we ran as high as 6,000 bushels in a day and night.

Q. And those are the only ones you know of? A. Yes, that is about the highest you can get by the way.

Q. That is 6,000 bushels per day? A. Yes.

Mr. Atkins: Day and night.

A. Yes, they charge overtime and everything. Now Mr. Ormsby—

By Mr. Taylor:

Q. Just one other question, you weren't figuring on selling this stuff as dried wheat, your only— A. (Interrupting) We didn't know if we could see a market, we would

have salvaged, we couldn't see a market so we didn't go any further.

Q. Were you figuring on selling only wet wheat? A. Sometimes we would sell it wet if we couldn't dry it.

Q. In this particular instance you figured on wet wheat? A. Yes.

Q. That is the only estimate you were going on? A. Yes, on a wet wheat basis.

Q. You weren't figuring on drying this wheat and selling it as cattle feed? A. No, let the other fellow gamble.

Mr. Taylor: That's all.

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Mr. Taylor: All right. Then we have a stipulation as to the price of this wheat, and I am willing to stipulate for the purposes of this proceeding that the wheat on the Mae Lowery and Marion O'Neill, for the purposes of this proceeding, was worth $2.00 a bushel at the time it was sunk, that is, before it was sunk, just prior to the time it was sunk.

Mr. Atkins: Would you go further, Mr. Taylor, I don't know that it is very material, but that the

—96—

price of all the wheat was $2.00 on all the barges?

Mr. Taylor: Yes.

Commissioner Mahoney: Excuse me, Mr. Atkins, is this stipulation between you gentlemen as to the price of the wheat inclusive or exclusive of freight, insurance and elevation?

Mr. Taylor: That is the entire value.

Commissioner Mahoney: That is inclusive of all

elements relating to the damages per bushel; $2.00?

Mr. Taylor: Right.

Mr. Atkins: It is exclusive of interest and costs, of course, and Libellant rests.

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MELVILLE HORN, recalled to the stand, having been previously sworn, testified further as follows:

Examination by Mr. Atkins:

Q. Mr. Horn, I show you what purports to be a debit memorandum from your office, dated November 6, 1953, addressed to Appleton and Cox, Inc., and ask you whether

—106—

that debit was paid? A. Yes, it was paid.

Q. And will you examine it and tell us whether that is for services rendered prior to the decision to abandon the cargo? A. Yes, up until that point when they agreed to abandon, that was the end of it.

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THEODORE DE MARS, called as a witness on behalf of the respondent, being first duly sworn, was examined and testified as follows:

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Cross Examination by Mr. Atkins:

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Q. Would you do a little computation for me, you were asked on direct examination to assume that one barge had 18,500 bushels in her. A. Yes.

Q. And the other had 19,000 bushels in her? A. Yes.

Q. That made a total of 37,500 bushels? A. Yes.

Q. Now, I would like to have you do it yourself at ten cents a bushel, what money salvage would you have? A. At ten cents a bushel?

Q. Yes. A. That is very easy, we have 37,500—

Q. Yes. A. $375.

Mr. Taylor: I object to that.

By Mr. Atkins:

Q. No, $3,750., isn't it?

Mr. Taylor: I want to get this objection on the

—135—

record, there is nothing in the evidence to support this.

The Witness: He asked me that.

Mr. Taylor: I understand that.

The Witness: It is ten per cent of 37,500, it is $3750.

By Mr. Atkins:

Q. Which is less than the cost of your salvage of $7,837. A. That is the answer to your question, but that had nothing to do with my computation, I wouldn't care if he didn't get five cents for that, I was getting a salvage job and

he is going to pay me to do it, what did I care what salvage he gets?

Q. All right, I will ask you this question, assume that when you were hired by Cargill you were also asked whether it would be feasible from a monetary point of view to salvage the cargo—

> Mr. Taylor: I object to it, Mr. Commissioner, because it just takes up the record. The witness said he knows absolutely nothing about the value of grain. What is the use of stocking up the record?
>
> Commissioner Mahoney: Let me ask the witness this question, do you at any time in being hired for any salvage operation whatsoever, regardless of the content of the boats, take into consideration the value
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> —136—
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> of cargo?
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> The Witness: I do not.

By Mr. Atkins:

Q. Now, I am assuming that you were hired on this job and asked whether it would be feasible from a monetary point of view to salvage this cargo? A. I was never asked.

Q. If you were asked. A. If Cargill called me and asked me and it was a cargo matter, I would say "You don't want me for your survey, you better get Mel Horn or Ronney Wells or someone else".

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Recross Examination by Mr. Atkins:

Q. Captain, I did want to ask you another question. When you finally got the grain to New York in barges,

how much would it cost to get the grain out of the barges in New York? A. I wouldn't know that.

Q. That's all. A. That would be the grain elevator's job.

Q. That is not in your computation? A. No, they have the legs and the suctions to take it out.

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—142—

BERT EISENBERG, called as a witness on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

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Cross Examination by Mr. Atkins:

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Q. All right, now, we have some wheat that is saturated in a barge. A. Yes, sir.

Q. And the wheat is salvaged and put into another barge in Albany. A. Yes, sir.

Q. You still have wet wheat? A. Naturally.

Q. But we have another element, we have more air? A. Yes, sir, we do.

—150—

Q. And there is an effect the air has on it? A. Air will affect it, yes, sir.

Q. And— A. (Interrupting) It wouldn't go down to the bottom, it will affect the top layer.

Q. There will be mildew on it? A. It may happen, it is all hypothetical, depending on the weather.

Jack Hanisch—for Bouchard—Cross

Q. And depending on time? A. The time element would be considered, but from my knowledge and experience the top layer may absorb a little bit.

Q. And it might cake? A. Well, it is possible, it is possible that it will but the wet wheat that I bought I used.

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JACK HANISCH, called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

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Cross Examination by Mr. Atkins:

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Q. What is the largest quantity of wheat of that kind that you handled in one operation? A. I think it was 15 or 20 tons.

Q. 20 tons, and this would be, as we figured out, about a thousand tons? A. Yes.

Q. When did you learn about the sinking of these two

—160—

barges? A. Only yesterday, actually I wasn't called in as a buyer, I was called in for my actual opinion of the grain as a whole.

Q. Did you ever buy any graded feed wheat? A. In small amounts, yes.

Q. In 1953? A. I wouldn't say so, no.

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—163—

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Marcus Marshall—for Bouchard—Direct

MARCUS MARSHALL, recalled, having been previously sworn, testified further as follows:

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Commissioner Mahoney: Well, let me address a hypothetical question to you then. Assuming that there was deposited at Cargill, Inc. in Albany 37,500 bushels of barley saturated to the maximum—

Mr. Atkins: Wheat.

Commissioner Mahoney: Wheat, saturated to the

—166—

maximum point of 30 per cent; is the drying mechanism you have here sufficient to dry that amount of wheat?

The Witness: No, sir.

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—173—

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Commissioner Mahoney: Let me ask you this question. You are in charge of the drying machine and all other machines incidental to the use of the drying machine at Cargill at Albany?

The Witness: Yes, sir.

—174—

By Mr. Taylor:

Q. Assume there were 37,500 bushels of wheat loaded at Buffalo, New York consigned to Cargill at Albany, and prior to reaching the point of destination that wheat was sunk and saturated to the point of 30 per cent and there-

after raised and delivered to Cargill at Albany; would you be able to receive and dry that wheat? A. No, sir.

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EUGENE C. MEYER, called as a witness in behalf of the Claimant-Respondents, Bouchard, being first duly sworn, was examined and testified as follows:

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Cross Examination by Mr. Atkins:

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—189—

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Q. What did you have to do with delivering the wet wheat from the barges to a place where it was delivered from the barges? A. Well, now, when we started in, we were putting it in our own dump scows,-the wheat.

Q. That is the Government dump scows? A. That is the Government dump scows, and it was taken down by our boats to the dump grounds and dumped. And then as far as I know—

Q. Now, does the 29,555 include the wheat that was dumped? A. Yes.

Q. Can you tell us the quantity of wheat which was dumped from your own dump scows? A. I think the quantity of wheat that was loaded in this grain boat that went to Universal grain boat, that was 18,400 bushels.

Q. The balance—strike that out. Assuming there was a total of 37,500 bushels shipped and on board at the time

these two barges were sunk, the difference between—I
—190—
think that's right, 37,500 Your Honor.

The Commissioner: That is correct, Mr. Atkins.

Q. The difference between 37,500 bushels and 18,400 bushels amounts to 19,100 bushels which then would represent, I am asking you, would represent the number of bushels that were washed away from the barges plus the number of bushels dumped.

Mr. Taylor: Does the witness understand the question? I am frank to say I don't.

Mr. Atkins: Well, I am asking the witness now.

The Witness: I would say that figure was possible. The grain had been loaded in our own scows and dumped, and the grain spread around at the time of the accident and the grain left in the scows, would represent that.

By Mr. Atkins:

Q. Including the grain that was washed away? A. That's right.

Q. Now, who owned the derrick No. 1? A. That is the Corps of Engineers.

Q. Tell us what equipment was, what Government owned equipment was used in the operation? A. Well, we had two dump scows.

—191—

Mr. Taylor: I would like to register my objection to what the Government used as no indication of what a private salvage individual would use, because their motives were entirely different. This one was

interested in clearing the channel and the other would be interested only in salvaging wheat.

The Commissioner: Objection overruled. The witness may answer.

By Mr. Atkins:

Q. Two dump scows? A. Two dump scows, and, of course, the derrick boat, and I believe we had two of our tugs there most of the time.

Q. Two? A. Government owned small tugs, yes.

Q. Will you describe the derrick—strike that out. There was no other derrick used other than derrick No. 1 is that correct? A. That's right.

Q. Will you describe the derrick? A. Well, that is a 20 ton machine, 100 feet long by well, 35.

Q. Was it a tug, scow, or anything like that, with a hold

underneath the deck? A. Yes, it has a hold underneath, but not to put any material like that.

Q. So no grain was put directly on the derrick? A. No.

Q. Now, was any outside equipment used other than Government equipment? A. Well, the only outside equipment that I know of was the scow, was the grain scow that we loaded that 18 or 19,000, or whatever we sold, and I believe that was furnished by the company that bought the wheat. But outside of that—

Q. I don't know the answer to this question, so I am asking you. Did the Government itself solely perform the operations of clearing the channel of these two wrecks? A. Yes.

Q. There was no contractual arrangement for anybody other than the Government to clear the channel? A. You are speaking of the channel?

Q. Yes. Was there? A. No. We removed the boats from the channel with our equipment.

Q. Do you know a Mr. Esmark. I am not sure of his name. A. Well, you got the right name, Esmark.

—193—

Q. Did he have anything to do with the operations? A. Not from the channel. He removed them from the shore where we left them, I believe. Mr. Esmark.

Q. Do you know what the Government contract price with Mr. Esmark was for that work? A. I could not say.

Q. Why was it necessary to remove the wrecks from the shore? A. Well, you just don't leave scows lying all around the shore, wrecked scows.

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—194—

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By Mr. Atkins:

Q. Following the sinking of both barges tell me whether at low tide the barges were awash and could you see the decks at low tide? A. The O'Neill—I think that was the one upstream?

Q. Yes. A. That was pretty much under water. I believe at low tide you could possibly see some of it, but I don't recall as it was out of the water at all. I think some of the wreckage may have been. But the one that was down-

—195—

stream, her decks were just out of water at low stream.

Q. Now, I am going to ask about tarpaulins. Whether you—take the one upstream first, that is the MARION O'NEILL, did you notice, did you take her tarpaulins off? A. Well, on the upstream one some of the tarpaulins were gone, some were in pieces, and I could say some of them

were missing. The tarpaulins were not intact. In other words, they were ripped.

Q. And how about the lower one, the MAE LOWERY? A. Well, on the MAE LOWERY, you understand of course that the scows were out there two weeks before we attempted to move them—some of them had divers on them —I don't know who they were and as to what was on there, I don't know. Probably there was a few tarpaulins left. I know we had pieces of tarpaulins which we loaded into our scows after we went through a lot of wood and broken timbers and so forth and so on.

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Recross Examination by Mr. Atkins:

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—204—

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The Commissioner: Mr. Meyer, at whose request did the United States Engineers commence to remove the wrecks from the channel? Or if not a request, was it done by decision of the United States Engineers independent of any request?

The Witness: I could not answer you that. When the scows are abandoned, which I believe they were, the Corps of Engineers undertook to remove them from the channel.

The Commissioner: So far as you know, it was not done by anyone outside of the request of the United States Engineers?

—205—

The Witness: No.

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—209—

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FRANKLIN H. HABER, called as a witness in behalf of the Respondent, being first duly sworn, was examined and testified as follows:

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—212—

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Cross Examination by Mr. Atkins:

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—215—

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Q. Is it a fact that you did request bids for the wet wheat taken from the respective barges? A. Yes, sir.

—216—

Q. Did you sell to the highest bidder? A. I believe so.

Mr. Taylor: I object to this.

Mr. Atkins: I am asking you.

The Commissioner: What is the basis of your objection, Mr. Taylor?

Mr. Taylor: Let's find out how it was done and what was done and I still object on the ground, of course, that this is not evidence, of course, of the value, as obviously it is not, but I have no objection to his telling us who they inquired from, when they inquired from and who they got responses from.

The Commissioner: Objection sustained, and I will ask the witness, did you advertise for bids.

The Witness: I could not answer. That was handled by Mr. Brennan in the New York office. I do have three copies here of three different bids.

The Commissioner: All right, I will let Mr. Atkins continue his examination. He has three copies of bids.

—217—

By Mr. Atkins:

Q. Will you state the amount of such bids?

Mr. Taylor: I object to the amount.

The Commissioner: Overruled.

Mr. Taylor: I would like to state on the record that I object to any evidence as to the amount offered for this wheat, because it is not in the regular course of business; no evidence of actual value; it is a sale of distressed merchandise.

Mr. Atkins: Now, may I answer here, I think this is an opportune time, may I be permitted—

The Commissioner: Go ahead.

Mr. Atkins: (Continuing) —to speak my little piece.

Mr. Taylor: Is it necessary?

Mr. Atkins: Now, you are not the Commissioner.

The Commissioner: Just a minute, gentlemen, the objection was overruled. The witness will be allowed to answer. If you have something to say with relation to Mr. Taylor's objection—

Mr. Atkins: The objection has been overruled.

—218—

The Commissioner: Yes.

Mr. Atkins: That is all right, then.

The Commissioner: You may answer.

Mr. Taylor: This is what I want to call to your attention, Mr. Atkins—

Mr. Atkins: Never mind. I am not interested.

The Witness: Here is a letter addressed to the New York office, District Engineer: "Forwarded herewith are three copies received for sale of wheat to be recovered in salvage operations by US Engineers and removal of sunken scows MARION O'NEILL and MAE LOWERY from Hudson River, Albany." Signed by Ambrose F. Brennan. And the three copies are attached.

Mr. Taylor: Does that answer the question?

Mr. Atkins: No. The amount.

The Commissioner: The question was as to the amount.

The Witness: The first one is from Cargo Recovery Corporation. "We bid ten cents per bushel measured in accordance with paragraph 1, with our equipment, after cargo has been dumped"—

Mr. Taylor: My objection to this line of questioning—

The Commissioner: Is on the record.

Mr. Taylor: (Continuing) —is on the record.

The Witness: The next one is by telegram from Millhurst Mills, Freehold, New Jersey, "We bid ten cents per bushel wet wheat containing 2154.42 cubic feet bushel loaded into grain barges New York." Did you want me to complete both these telegrams?

The Commissioner: Just the amount of the three separate bids.

The Witness: Yes. One has "our check $380 reduction 10 per cent deposit," ten cents was the bid. This one is ten and total quantity 19,000 wheat bushels. This one is from Universal Grain Company regarding 2145 based on 19,000 bushels loaded on

scows furnished by us—2150 and four-tenths cubic bushels. You are to advise us if we are the successful bidder and we will send you a certified check.

The Commissioner: What was the amount of their bid?

—220—

The Witness: $2945, based on 19,000 bushels.

By Mr. Atkins:

Q. Twenty-nine cents? A. $2,945.

Q. $2,945. And to whom did you sell? A. Universal Grain.

Q. You accepted the bid of Universal Grain? A. Universal Grain Company.

Q. Does the Army Engineers, as a bookkeeping proposition, or for any other purpose, set up a value for the cost of the operation which Mr. Meyer has described? A. I wish you would be more explicit on the question.

Q. For example, for a period of a number of days you used derrick 1. Now, does the Government make any bookkeeping or appraisal cost of the use of the derrick? A. Let me answer it this way.

Q. Yes. A. Any job—no, any is not correct—most jobs we make an estimate of cost before we do a job. I think that is what you are trying to ask me.

Q. Well, the obligation—that is the question,—did you not consider that the obligation to clear the barges from the

—221—

channel, having been abandoned, was on the Government? A. I don't follow that question.

Q. Well, there were two wrecks that obstructed the channel. A. Correct.

Q. Is that correct? A. That's right.

Franklin H. Haber—for Bouchard—Cross

Q. Now, the purpose of removing the barges was to clear the channel? A. That's right.

Q. For navigation; is that not correct? A. That is correct.

—222—

* * * * *

Q. Now, I am asking whether the Government would keep any record of the expense, that is, any charge with respect to the use of derrick No. 1? A. We did keep a record of the cost of this job.

Q. Could you state what the cost was?

Mr. Taylor: I object to it as no evidence of what an ordinary salver—what it would cost an ordinary salver.

The Commissioner: I overrule the objection. The witness may answer.

The Witness: This again is on that note, that Mr. Taylor called me and I got this information for him. I put this note in here that the cost amounted to, grain operation removal cost, $9,980.43.

By Mr. Atkins:

Q. Did that involve the—was there an item in that cost for the removal of the barges, where they were located, as you testified to, at different locations? A. That includes removal of the grain and removal of the barges from the river to shoreward of the channel.

Q. And did the barges remain there? A. They were

—223—

removed later by contract.

Q. And can you tell us the amount of such contract?

Mr. Taylor: I also object to this as not binding and no evidence of what it costs a commercial salver.

The Commissioner: Overruled.

The Witness: The amount of the contract was $7,771.

By Mr. Atkins:

Q. $7,771. And who did the removing? A. Island Marine Contracting Corporation, Box 297, New Rochelle, New York.

Mr. Atkins: That is all.

The Commissioner: Mr. Taylor?

Redirect Examination by Mr. Taylor:

Q. Mr. Haber, would you please look at your files and see whether there is an earlier telegram from Mr. Lowery. My recollection is that it was September 25.

Mr. Atkins: May I interrupt?

A. Well, there is a copy of a telegram here dated 25 September 1953, addressed to U.S. Engineers, Custom House, Post Office Building, Albany, New York. "I as owner of barges MARION O'NEILL and MAE LOWERY sunk Hudson River Albany herewith notify you of the abandonment thereof. Frank A. Lowery."

Q. Can you tell us the date?

The Commissioner: What is the date of that telegram?

The Witness: September 25, 1953.

Eugene C. Meyer—for Pouchard—Redirect

By Mr. Taylor:

Q. Is there anything there to indicate the time that that telegram was sent? A. Five twenty-six a. m.

Q. Of September 25. Mr. Haber, will you look at your records and see—strike that out. So, it seems that Mr. Lowery abandoned the barges on the early morning of September 25. A. There is a copy of that telegram to that effect in here.

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—225—

Q. Yes. Now, you say that there were some bids for the purchase of this cargo. Now, when did you make a request for bids and when were the bids closed? A. This is dated 28 September, 1953. This is a copy of—there is no signature on it. But it does say here "Sealed bids will be received in the Albany sub-office, New York, District Corps of Engineers, Room 322, Federal Building, Albany, New York until ten a. m. eastern standard time 29 September, 1953."

Q. In other words, bidders have until ten o'clock September 29th? A. And then publicly opened for the purpose of recovering sunken wheat contained in the sunken barges MARION O'NEILL and MAE LOWERY.

Q. So that the bids were to be filed by September 29 at ten a. m.? A. That is correct.

Q. And when did you ask for bids? A. This is dated—it is not an official file by the way—official records are in New York. These are copies. This is dated September 28, 1953.

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—233—

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Eugene C. Meyer—for Bouchard—Recross

Recross Examination by Mr. Atkins:

Q. I am directing your attention to the contract cost of $7,771. A. That's right.

Q. For the removal of the barges to the shore, to the place where they ultimately were put. Now, I would like to have you assume that after the abandonment of the barges by the owner of the barges, the owner of the cargo then came in and, in effect, said we would like to conduct a salvage operation to recover as much grain as we can for the purpose of salvaging grain. Now, would you have permitted such an operation in the river by the use of a derrick, as I say,

—234—

that would clam out grain into barges alongside without requiring the cargo salver to place the barges in a—dispose of the barges or put them in a location agreeable to the Army Engineers? Do you follow my question? A. It is quite a lengthy question.

Q. Yes. A. But the decision would rest entirely with the District Engineer. I would not decide any such thing.

Q. Well, can it not be assumed that when the Government spends $7,771, that the barges have not been put in a place agreeable to the Army Engineers?

Mr. Taylor: I object to this.

The Commissioner: I will sustain it.

Mr. Atkins: As to form.

The Commissioner: I sustain that objection. The Government didn't spend the seven thousand dollars—$7,771, to remove the wrecks from the shore. The Government received that much on contract for that removal.

The Witness: They paid the contractor that for the removal.

The Commissioner: They paid the contractor that

—235—

for the removal?

The Witness: Yes, less a penalty.

By Mr. Atkins:

Q. In other words, you set a price of $9,980, plus the contract price of $7,771, totalling $17,751 and some odd cents, which represents the cost of clearing, of the entire operation to the point where the cargo, the barges have been disposed of, the cargo had been dumped, cargo has been delivered to, on board barges of the buyer of the wet grain? A. That cost includes removal of the grain and the barges from the river.

Q. That is the total amount of $17,751.? A. Correct. And forty-three cents.

Q. Forty-three cents. That is all.

Re-Redirect Examination by Mr. Taylor:

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—236—

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Q. Where were the barges removed to? A. To the East Shore of the River.

Q. From— A. You mean the final disposal. As I recall they were taken down river, torn apart and burned up.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Tug ELLEN S BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. and BOUCHARD TRANSPORTATION CO., INC.,

Petitioners,

—against—

CARGILL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York 5, N. Y.

INDEX

PAGE

Opinion Below 2

Jurisdiction 2

Supreme Court Admiralty Rule Involved 2

Questions Presented 2

Statement 4

Reasons for Granting the Writ 5

1. The Courts below have misapprehended the standard of judicial review under Admiralty Rule 43½, in reversing the Commissioner 5

2. The decision in the case at bar is in conflict with the decision of this Court in *The Baltimore* v. *Rowland*, 75 U. S. (8 Wall.) 377 13

Conclusion 17

Citations:

The Baltimore v. Rowland, 75 U. S. (8 Wall.) 377 ....4, 13, 14

The Glenbogie, 1937 A. M. C. 1194 (not otherwise reported) 16

Kimberly v. Arms (1889), 129 U. S. 512 6

McAllister v. United States, 348 U. S. 19 3

PAGE

United States v. Kirkpatrick, 186 F. (2d) 393 6
United States v. Oregon State Medical Soc., 343 U. S. 326 3
United States v. United States Gypsum Co., 333 U. S. 364 ..... 3, 7, 10, 11
United States v. Yellow Cab Co., 338 U. S. 338 ..... 11, 12
United States v. Yellow Cab Co., 80 F. Supp. 936 11

Supreme Court Admiralty Rules:

Rule 43½ 5, 6, 10, 13

Federal Rules of Civil Procedure:

Rule 52(a) 6

Supreme Court Equity Rules:

Rule 61½ 6

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Tug ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC., and BOUCHARD TRANSPORTATION CO., INC., Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 6, 1958 (RA 71),* affirming a final decree in admiralty (RA 1) entered upon an order of the United States District Court for the Northern District of New York which reversed the findings and conclusions of the Commissioner appointed by the District Court to ascertain and compute the amount of Libelant's (Cargill, Inc.) damages.

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* "PA" refers to Petitioners' Appendix in the Court of Appeals; RA refers to Respondent's Appendix in that Court; R refers to record pagination.

Opinion Below

The Court of Appeals affirmed the final decree of the District Court on the opinion of that Court (RA 69). The opinion of the District Court (PA 90a-97a) is reported in 1957 A.M.C. 1563, and has not been officially reported. The Report of the Commissioner (PA 73a-89a) is not officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 6, 1958 (RA 71). The jurisdiction of this Court is invoked under Section 1254 of Title 28, U. S. C. A.

The Supreme Court Admiralty Rule Involved

The pertinent provisions of Rule 43½ of this Court's Admiralty Rules are as follows:

> "In all references to commissioners or assessors, by consent or otherwise, whether the reference be of all issues of law and fact, or only particular issues either of law or fact or both, the report of the commissioners or assessors shall be treated as presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed: • • • "

Questions Presented

Two barges laden with wheat sank as a result of a collision with Petitioner's vessels, in the fresh, shallow water of the Hudson River near Albany. Petitioners having been

found at fault for the collision, a Commissioner in Admiralty was appointed to ascertain the cargo owner's damages. After a hearing, the Commissioner, on uncontradicted, unimpeached testimony of experts, whose testimony, in part, was buttressed by documentary evidence, found that most of the wheat could have been recovered, dried and sold as animal feed for which there was a regular wholesale market at a price which would have netted the cargo owner an amount that would have reduced an otherwise total loss of $75,000 to about $36,000. The questions are:

1. Must a District Court on reviewing a Commissioner's report, under Admiralty Rule 43½ accord the Commissioner's fact findings the same degree of finality that a reviewing Court is required to accord to fact findings of a trial judge in a non-jury case?

2. Assuming that the answer to Question "1" is in the affirmative, so that the "clearly erroneous" standard of review as laid down by this Court in *United States* v. *Oregon State Medical Soc.*, 343 U. S. 326, 339; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395; and, *McAllister* v. *United States*, 348 U. S. 19 applies to review of fact findings by a Commissioner, did the courts below depart from this standard by rejecting the fact findings of the Commissioner summarized in the preamble to these Questions?

3. By formulating the "clearly erroneous" standard of review as this Court did in the cases mentioned in the preceding Question, did this Court intend to permit a reviewing court to reject fact findings by its Commissioner representing the acceptance of uncontradicted testimony by witnesses in no way impugned, merely because the reviewing court is left with the conviction that the Commissioner was mistaken in crediting that testimony?

4. Were the courts below warranted in concluding that the wheat in the sunken barges was a total loss in view of the duty which this Court in *The Baltimore* v. *Rowland*, 75 U. S. (8 Wall.) 377, 386-388 cast upon the owner of a vessel sunk by collision in *shallow* waters, near the shore, to undertake "by reasonable exertions" (*The Baltimore* at 19 L. ed. p. 465) to prevent a total loss, where, as here, the vessel may easily be raised and the cargo salvaged at a cost but a fraction of the salvage value?

5. Whether in the circumstances of this case, the Courts below erred in concluding that the cargo owner sustained a total loss?

Statement

A collision occurred as a result of which two barges with their cargoes of wheat, aggregating 37,500 bushels, sank in the fresh shallow waters of the Hudson River near Albany, New York. Petitioners were found to be liable for the collision and a Commissioner in admiralty was appointed to assess Libelant's damages. After a hearing, the Commissioner reported that the wheat in the sunken barges was worth $75,000 in sound condition; that most of the wheat could have been salvaged and sold as animal feed for a price that would have resulted in a net salvage recovery of approximately $40,000; but that the cargo owner had failed to take reasonable steps to accomplish salvage and the Commissioner therefore concluded that the recovery of the cargo owner should be reduced by the net amount that would have been realized had salvage been undertaken (PA 73a-89a).

The Commissioner found that the wheat could have been dried and sold in the New York wholesale market as animal feed for approximately $50,000, that the total expense in-

volved would have been under $12,000 and fixed libelant's damages at about $36,000 (PA 81a-84a, Bouchard Exhibits 4, 5 and 5a).

The District Court set aside the Commissioner's report and gave Libelant judgment for the full value of the sunken wheat as a total loss because the Court took the view that the Commissioner had applied the rule that requires minimization of preventable damages too harshly (PA 92a). In rejecting the findings of the Commissioner, the District Court observed that one of the expert witnesses was a dairy farmer, with the implication that his testimony was not worthy of acceptance (PA 95a). The fact is however, that the witness had been in the feed grain business for years and was also the owner of a herd of cattle. No reason at all was given by the District Court for rejecting the testimony of the other experts, or for ignoring documentary evidence as to the market price of animal feed which confirmed their testimony. Once the District Court had concluded that the Commissioner erred in finding that the wheat could have been sold as animal feed for the large amount that the evidence revealed could have been obtained, there was, of course, no basis for sustaining conclusion of the Commissioner that salvage should have been undertaken. On appeal the Court of Appeals affirmed, on the opinion of the District Court (RA 69).

Reasons for Granting the Writ

1. The Courts below have misapprehended the standard of judicial review under Admiralty Rule 43½, in reversing the Commissioner.

Under Admiralty Rule 43½, which declares that "in all references to commissioners * * *, the report of the com-

missioner * * * shall be treated as presumptively correct," and permits the court to reverse the commissioner only when satisfied "that error has been committed," the standard of judicial review, as we shall point out, is the same as under the "clearly erroneous" rule of Rule 52(a) of the Federal Rules of Civil Procedure.

There has long been a distinction between a reference to a commissioner or a master on consent of the parties, and a compulsory reference by the court. In *Kimberly* v. *Arms* (1889), 129 U. S. 512, 523, this Court stated that, absent consent of both parties, a court "cannot of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers" (129 U. S. at 524). But prior to September 1, 1932, when Admiralty Rule 43½ and Equity Rule 61½ became effective, a district court had the right to make a reference in an admiralty or equity case to a commissioner or master which would be advisory merely, and in which the report would be in no way binding upon the court. This Court in *Kimberly* v. *Arms*, in discussing such an advisory report said that on review the court might "accept and act upon, or disregard in whole or in part, according to its own judgment as to the weight of the evidence" (129 U. S. at 523) the findings of the commissioner.

A fundamental change of policy in regard to compulsory references occurred however, with the coming into force of Admiralty Rule 43½ and Equity Rule 61½. The history of this change is discussed in the opinion of Judge Maris, writing for the unanimous Court, setting *en banc*, in *United States* v. *Kirkpatrick*, 186 F. (2d) 393. The Court in *Kirkpatrick* concluded that Admiralty Rule 43½ and its equity analogue had abolished advisory references, and had imposed upon the commissioner the duty of passing

upon the merits and of making definitive findings and conclusions; further that "the findings of fact so made (were) subject to modification or rejection by the district court only if it is fully satisfied that error has been committed" (186 F. (2d) 393 at 397). Judge Maris went on to say:

> "It is settled that the criterion under Admiralty Rule 43½ is the same as that now laid down in civil cases by Civil Procedure Rule 53(e), 28 U. S. C. A., the successor of Equity Rule 61½, namely, that "the court shall accept the master's findings of fact unless clearly erroneous." Todd Erie Basin Dry Docks v. The Penelopi, 2 Cir. 1945, 148 F. 2d 884, 886; Pioneer Import Corporation v. The Lafcomo, 2 Cir. 1947, 159 F. 2d 654, 656, certiorari denied; Black Diamond Lines v. Pioneer Import Co., 331 U. S. 821, 67 S. Ct. 1310, 91 L. Ed. 1838; Ozanic v. United States, 2 Cir. 1948, 165 F. 2d 738, 742; Zeller Marine Corporation v. Nessa Corporation, 2 Cir. 1948, 166 F. 2d 32. The effect of Admiralty Rule 43½, therefore, is that in the ordinary case a finding of fact by a commissioner based upon conflicting testimony and a determination of the credibility of the witnesses before him is final in the sense that the district court on review may not substitute its judgment as to the weight of the evidence or the credibility of the witnesses for that of the commissioner." 186 F. (2) at p. 397.

From what has been said, it is clear that the standard of judicial review of a fact finding, whether by a Commissioner, or a Master, or a Judge in a non-jury case, is the same: namely, that the finding should not be disturbed unless "clearly erroneous."

When then, may a finding be said to be "clearly erroneous?" In *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395, this Court has said that a finding

> "is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Although this Court's definition of what the phrase "clearly erroneous" means in the *Gypsum* case, read in its context, affords a criterion which can be applied without difficulty, there is a narrow class of cases in which the test laid down, read out of context, has been too broadly interpreted by the reviewing courts. The case at bar is a clear illustration of what we mean.

The question before the Commissioner was whether or not the owner of the sunken wheat had made reasonable exertions to prevent avoidable aggravation of damage. Three practical fact questions underlay the most critical aspect of this inquiry, namely: (1) how much of the wheat could be recovered out of the sunken hulls; (2) the cost of getting the wheat out of the barges, transporting it to New York City where it could be dried and sold in the wholesale animal feed market; and (3) what price it would have commanded if sold for animal feed in that market. The first thing to observe is that all three questions are pure questions of fact. The amount of wheat that could have been and, in fact, was recovered, was not a difficult question, nor did the parties differ greatly on the expense involved in the salvage operation. The cargo owner's representative conceded that if the wet wheat had been dried, "you might get as much as a feed price for it * * * " (PA 15a, 16a). Petitioners' witnesses all testified that the wheat, if dried, could have been sold as animal feed grain. Thus, there was no controversy that the wet wheat could have been dried and sold as animal feed. This left open only the question of the price of animal feed in New York in the month of October, 1953, when the sale could have been

made. As to this, petitioners put in evidence, without objection, a trade publication (Pet. Exh. 4) and an exchange of telegrams with its publisher (Pet. Exhs. 4 and 4a) that confirmed the wholesale market price of brewers' dried grain in October 1953.

Petitioners also produced two expert witnesses, one of whom had been in the animal feed business for more than twenty years, dealing primarily in brewers' dry and wet grains, and the other in the business of selling animal feeds made from grains. These witnesses, without contradiction, testified that the wheat, if totally saturated with water, would, after reconditioning, have had a value equal to, if not greater than, dried brewers' grain, which had an actual market value of $57.00 per ton during the entire month of October, 1953.

Noting that this oral testimony was uncontradicted, and was buttressed by confirmation from a disinterested market report, which was received without objection, the Commissioner made the critical findings that:

"Libellant knew that a cargo valued at $75,000 was submerged in comparatively shallow water. Yet, beyond assigning its rights under a loan receipt agreement with its insurance underwriters, it did nothing to determine if the cargo could be salvaged and resold. The underwriters retained Inland Survey Bureau, Inc. to study the facts and report if salvaging would be feasible. Mr. Horn, the president of Inland Survey Bureau, Inc. and the gentleman who ultimately made the decision to abandon the cargo, didn't even come to Albany to view and study the situation first hand. He sent a Mr. Hyland whose activities with respect to determining the feasibility of salvaging were, in my opinion, nominal. He was not called as a witness for libelant.

> For these reasons, I find that the libelant did not discharge the duty to minimize its damages and its loss is partial, rather than total, with respect to the number of bushels that could have been salvaged if libelant had undertaken such an operation" (PA 85a).

The District Court rejected this finding, stating:

> "There is nothing between the testimony of DeMars, a hull surveyor, and the two alleged experts from New York, one a dairy farmer, in the effort to establish the value of animal feed in the New York Market. Even if such evidence were reliable and in closer harmony with reality, it is questionable whether the New York City value would legally be the proper market for the ascertainment of value in this case" (PA 95a-96a).

The Court of Appeals affirmed on the opinion of the District Court and therefore adopted the rejection of the Commissioner's finding on this crucial fact question. In doing so, we believe the courts below departed from the correct standard of judicial review.

We do not question the fact that a reviewing Court under Admiralty Rule 43½ is entitled to reject a fact finding by the Commissioner if the Court concludes that such fact finding is "clearly erroneous" in the sense that this Court used the phrase in the *United States Gypsum Co.* case. It is important, however, to bear in mind the context of the *Gypsum* case in understanding the phraseology that this Court used in explaining when a fact finding by a judge in a non-jury case is to be deemed "clearly erroneous." In *Gypsum*, an anti-trust action, this Court noted that the Government "relied very largely on documentary exhibits" (333 U. S. at 395) for the purpose of demonstrating that the authors of the documents had acted in

concert. The oral testimony of the defendants was a denial that they had acted in concert, or that they had agreed to do the things which, in fact, were done. The Trial Judge credited the denials, even though the facts denied were established by *ante litem motam* documents. This Court, in rejecting the denials, declared: "Where such testimony is in conflict with contemporaneous documents, we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the Trial Court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous" (333 U. S. at 396).

In *Gypsum*, moreover, this Court stressed the importance of a Trial Judge's advantage in resolving testimonial conflicts, or in assessing the credibility of a witness, when it noted that findings of the Trial Court "when dependent upon oral testimony where the candor and credibility would best be judged, had great weight with the Appellate Court" (333 U. S. at 395). The interpretation of *Gypsum* just advanced is also buttressed by this Court's decision in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, an anti-trust suit in which this Court affirmed the Trial Judge's findings against the Government. The opinion of the Trial Court (80 F. Supp. 936) makes it clear that, unlike the *Gypsum* record, the oral testimony was not contradictory of inferences that could reasonably be drawn from the documentary evidence. The critical issue was whether the trial judge was warranted in accepting the defendant's oral testimony weighed in the light of the documentary evidence which was of an equivocal nature. This Court, in sustaining the Trial Court, noted that the issues concerned the design, the motives, and intent with which the defendants had acted, and that the Trial Court had the benefit of hearing and seeing the witnesses who had made the

records from which the Government would draw an inference of guilt but had concluded that the documents were consistent with an innocent meaning (338 U. S. at 341). Mr. Justice Jackson, writing for the majority, in affirming the Trial Court, stated:

> "While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not "clearly erroneous" (338 U. S. at 342).

In the case at bar, the crucial fact findings of the Commissioner were supported by uncontradicted oral testimony in no way discredited, and in part by written confirmation from a disinterested source. The Commissioner who had the opportunity to see and hear the expert witnesses believed them.

The rejection of fact findings supported by such evidence is plainly arbitrary.

On what basis, then, did the District Court reject the Commissioner's findings that this wheat could have been salvaged if reasonable steps had been taken to recondition and sell it in the animal feed market? So far as we are able to understand, the rejection rests on nothing more than a subjective belief by the District Judge that the expert witnesses did not know what they were talking about—a judgment not supported by anything in the record. Experience teaches that such *a priori* assumptions are very dangerous when the subject matter is the province only of an expert in a highly specialized trade. Plainly, therefore,

the District Court misapprehended the scope of review contemplated by Admiralty Rule 43½.

It is of the utmost importance, especially in admiralty cases, where Commissioners are regularly employed in ascertaining damages, that this Court make it clear that its statement in *Gypsum* that the reviewing court may reverse a fact finding of its commissioner if left with the definite and firm conviction that a mistake has been committed, was not intended to permit a reversal of a finding that represents the resolution of a testimonial conflict or the appraisal of the credibility of witnesses, absent record evidence that impugns the reliability of the oral testimony.

2. The decision in the case at bar is in conflict with the decision of this Court in *The Baltimore* v. *Rowland*, 75 U. S. (8 Wall.) 377. In *The Baltimore*, a schooner laden with coal was sunk in collision with a steamer in the Potomac River. The lower court found her and her cargo to be a total loss. In reversing the decree which rested on that finding, this Court declared:

> "Justice as well as sound policy forbids that the owner of a vessel sunk by collision should be allowed to recover the full value of the vessel and cargo except in cases where the entire property is lost by the disaster, which is not true in a case where, by reasonable exertions, the vessel may be raised and the cargo saved by the use of such nautical skill as the owners of vessels usually employ in such emergencies. Owners of vessels seeking redress in such cases must be prepared to show, not only that those in charge of the other vessel were in fault, but that no negligence on their part has increased or aggravated the injury." *The Baltimore* v. *Rowland*, 75 U. S. (8 Wall.) 377 (19 L. ed. 463, 465-466).

Mr. Justice Clifford, writing for the unanimous Court, went on to say:

> "Evidence, however, that the injured vessel is sunk is not of itself sufficient to show that the loss was total, nor is it sufficient to justify the master and owner in abandoning the vessel or the cargo unless it appears that the circumstances were such that the vessel could not be raised and saved, or that the cost of raising and repairing her would exceed or equal her value after the repairs had been made" (19 L. ed. at p. 465).

In the present case, two sunken barges, laden with wheat, were in shallow water. In fact, the deck of one was above the water level at low water. Furthermore, the barges came to rest only a short distance from the shore. As we understand the doctrine of *The Baltimore*, a finding that the wheat was a total loss should not have been made, absent evidence either that the cargo could not be raised, or that the cost of raising and drying the wheat would have been greater than its value after such reconditioning. It should also be noted that in *The Baltimore*, the burden of adducing that evidence rests with the owner of the vessel or cargo who asserts a total loss. The Commissioner in this case concluded that the cargo owner did not meet the burden cast upon it to demonstrate that the wheat was a total loss. In his report, the Commissioner stated:

> "Libelant knew that a cargo valued at $75,000.00 was submerged in comparatively shallow water. Yet, beyond assigning its rights under a loan receipt agreement with its insurance underwriters, it did nothing to determine if the cargo could be salvaged and resold. The underwriters retained Inland Survey Bureau, Inc. to study the facts and report if salvaging would be feasible. Mr. Horn, the president of Inland Sur-

vey Bureau, Inc. and the gentleman who ultimately made the decision to abandon the cargo, didn't even come to Albany to view and study the situation first hand. He sent a Mr. Hyland whose activities with respect to determining the feasibility of salvaging were, in my opinion, nominal. He was not called as a witness for libelant.

For these reasons, I find that the libelant did not discharge the duty to minimize its damages and its loss is partial, rather than total, with respect to the number of bushels that could have been salvaged if libelant had undertaken such an operation" (PA 84a).

At the hearing before the Commissioner, Mr. Horn stated that his object in sending Mr. Hyland to Albany, following the disaster, was to investigate the possibility of arranging for the sale of the wheat, "as is, where is," in the sunken barges. Horn stated that he was satisfied that the amount that he could realize for the wheat as *wet wheat* would not be enough to compensate him for the expense involved in its recovery (PA 16a). Mr. Horn did not investigate the feasibility of drying the wheat and selling it for animal feed. He conceded at the hearing before the Commissioner that a feed price might have been obtained, but when asked why he did not adopt this method of salvage, contented himself with saying that he preferred not to gamble. He did not, however, attempt to explain that such a project involved a gamble and conceded that he had made no effort to find out how much the feed price was at the time. Petitioners, as has been noted, adduced evidence which was uncontradicted that most of the wheat could have been recovered and dried and sold for feed grain and would have reduced the cargo loss from $75,000 to approximately $36,000. The Commissioner was plainly justified in concluding that the cargo owner did not meet the burden

which *The Baltimore* casts upon it of demonstrating that the cargo was a total loss.*

The District Court in rejecting the Commissioner's findings concluded that the abandonment by the cargo owner of any attempt at salvage was reasonable. As has been noted, the District Court aribitrarily rejected the crucial fact findings of the Commissioner that most of the wheat could have been recovered, reconditioned, and sold for animal feed at a price that would have greatly reduced the loss. Indeed, if the wheat could not have been dried and sold for animal feed; if, contrary to the fact, its only value was as *wet wheat,* we would never have questioned that the cargo was a total loss. The other reasons which the District Court gave to justify Mr. Horn's decision to abandon the cargo as a total loss would have no validity if the cargo had great salvage value as the Commissioner found. In short, Petitioners demonstrated that this wheat was not a total loss, and the cargo owner's representative, Mr. Horn, failed completely to demonstrate that it was a total loss, a burden which *The Baltimore* rule casts upon the cargo owner.

The doctrine of *The Baltimore* has been a fundamental tenet of the shipping industry for almost one hundred years. The decision below subverts the sound policy considerations that underlie its doctrine. In modern times, when most bulk cargoes are insured, with the result that the owner on being paid by his underwriter no longer has a financial interest in salvaging his property, there is greater danger than in the past that no or half-hearted salvage attempts will be made. In this very case, Cargill, Inc., probably the most important grain dealer in the world, did nothing itself to effect salvage because it had been paid the full value of the wheat.

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* Compare the salvage measures undertaken in raising, drying, and selling sunken wheat in *The Glenbogie*, 1937 A. M. C. 1194 (not otherwise reported) with the cavalier gesture in the present case.

CONCLUSION

For these reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

KRISEL, BECK & TAYLOR
Attorneys for Petitioners

ROMAN BECK
Of Counsel

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 149—October Term, 1957.

(Argued January 13, 1958 Decided February 6, 1958.)

Docket No. 24763

CARGILL, INC.,

Libelant-Appellee,

—against—

TUG FRANK A. LOWERY and FRANK A. LOWERY,

Claimant-Respondents,

TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC., and BOUCHARD TRANSPORTATION CO., INC.,

Claimant-Respondents-Appellants,

and

INLAND SURVEY BUREAU, INC.,

Respondent-Impleaded-Appellee.

Before:

MEDINA and MOORE, *Circuit Judges,*
and GALSTON, *District Judge.*

Appeal from an order of the United States District Court for the Northern District of New York awarding damages to libelant for the total loss of cargo on the barges Marion O'Neil and Mae Lowery. James T. Foley, *Judge*. Opinion below not reported. Affirmed.

ATKINS & WEYMAR, New York, N. Y. (Horace T. Atkins, New York, N. Y., of Counsel), *for libelant-appellee*.

KRISEL, BECK & TAYLOR, New York, N. Y. (Roman Beck, New York, N. Y., of Counsel), and James F. Dalton, Albany, N. Y., *for claimant-respondents-appellants*.

PER CURIAM:

Affirmed on Judge Foley's opinion, filed June 4, 1957.

Judgment

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February one thousand nine hundred and fifty-eight.

Present:

Hon. Harold R. Medina,
Hon. Leonard P. Moore,

Circuit Judges,

Hon. Clarence G. Galston,

District Judge.

Cargill, Inc.,

Libellant-Appellee,

—v.—

Tug Frank A. Lowery, *et al.*,

Respondents-Appellants,

and

Inland Survey Bureau, Inc.,

Respondent-Impleaded.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk

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IN THE

Supreme Court of the United States

No. 916—October Term, 1957

TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC., and BOUCHARD TRANSPORTATION CO., INC.,

Petitioners,

—against—

CARGILL, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

KRISEL, BECK & TAYLOR
Attorneys for petitioners

INDEX

PAGE

POINT I

Respondent was duty bound to salvage the wheat, if as the Commissioner found, salvage was commercially feasible 2

POINT II

In applying the doctrine requiring mitigation of damage, petitioners adduced evidence before the Commissioner, clearly demonstrating that the sunken wheat could have been raised, transported for drying at New York, and sold there as animal feed for a price that would have yielded some $40,000.00 above the expense involved in such a salvage undertaking 5

POINT III

The Courts below did not apply the correct standard of judicial review under Admiralty Rule 43½ 6

CITATIONS:

Cases:

The Baltimore, 75 U. S. (8 Wall.) 377 2
Bird v. Cromwell, 1 Mo. Rep. 58 3
Chouteaux v. Leach & Co., 18 Pa. State Rep. 224 3
The El Monte, 252 F. 59; cert. den. 248 U. S. 593 3
The Florida, 61 F. 2d 55 3
Grace v. Charleston, 193 F. 2d 539 3

PAGE

The Niagara v. Cordes, 62 U. S. 7 ..... 2, 3

Seaman v. The Crescent City, Case No. 12,581, 21 Fed. Cases 914 4
The Scotland, 105 U. S. 24 2
Smith v. Condry, 42 U. S. 28 ..... 2, 4

The Umbria, 59 F. 489 3
United States v. Los Angeles Soap Co., 83 F. 2d 875 .. 3

Weirton v. Isbrandtsen, 126 F. 2d 593 3

In the

Supreme Court the United States

No. 916—October Term, 1957

Tug Ellen S. Bouchard, Motor Tug Ellen S. Bouchard, Inc., and Bouchard Transportation Co., Inc.,

Petitioners,

—against—

Cargill, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

The substance of the opposition to the petition is the contention that respondent was not duty bound to attempt salvage if that involved transporting the wheat for drying and sale at New York City. Respondent mistakenly argues that as a matter of law, it was entitled to recover the full value of the wheat at the time and place of the sinking, and that the Courts below applied the correct standard of review. None of these contentions has merit.

POINT I

Respondent was duty bound to salvage the wheat, if, as the Commissioner found, salvage was commercially feasible.

Respondent, as did the Courts below, refers to the rule of damages applied in *The Scotland*, 105 U. S. 24 and in *Smith* v. *Condry*, 42 U. S. 28, namely, that the measure of damages for the loss of a vessel or of her cargo is their value at the time and place of injury, and does not include the loss of an anticipated profit, realization of which had been prevented by the disaster. We have no quarrel with this rule. It does not follow, however, as respondent argues that the vessel owner or cargo is not bound to mitigate the damages if that is commercially feasible, and that this obligation may require undertaking salvage, including disposal of the salvage product, at a place other than where the sinking occurred. This is the teaching of *The Baltimore*, 75 U. S. (8 Wall.) 377.

Nor is it true that the duty to prevent avoidable aggravation of damage is less when, as here, a perishable commodity is involved. This Court, in *The Niagara*, 62 U. S. 7, emphasizes that the perishable nature of the cargo only enhanced the carrying vessel's duty to act promptly to avert loss. In so holding, the Court observed that the ship is burdened by that duty so long as "it appears that the goods have not perished with the wreck and certainly not where, as in this case, the vessel is only stranded on the beach." 62 U. S. 7, 16 L. Ed. 41, 47.

Many cases demonstrate the measures that must be taken by a prudent cargo owner or bailee of damaged

cargo in order to minimize a loss. See, for example: *The El Monte* (5 Cir. 1918), 252 F. 59, 64-65; *cert. den.* 248 U. S. 593, in which the action taken to minimize a loss to wheat "damaged by salt water" included "unloading, drying, reconditioning, and reloading" (at p. 64) and thereafter transporting and selling the wheat in Rotterdam, where it could be sold for a higher price than in Galveston, where the damage occurred; *The Umbria*, 59 F. 489, 490, in which cargo recovered from a sunken vessel was "sold at the City of New York after various expenses were incurred in putting it into a proper condition for sale"; *Grace* v. *Charleston*, 193 F. 2d 539, in which cotton damaged by "exposure to salt water" (at p. 542), was recovered "while floating in the water" and "from the beach upon which it had been washed" (at p. 544), so that it became necessary "to rehandle the cotton" (at p. 544); within less than a week the cotton was inspected, identified, weighed and fumigated, passed through Customs, and delivered to the railroad for transportation from North Charleston to Charleston; *Weirton* v. *Isbrandtsen*, 126 F. 2d 593 (C. C. A. 2), in which the consignee of tin plates "reconditioned them as far as possible," though "the reconditioning left the plates dull and imperfect in appearance" (at p. 593); *The Florida*, 61 F. 2d 55, where a cargo of cement damaged by water was reconditioned and held in storage for a long period, in order to await an opportunity to sell it at a higher price. See also *United States* v. *Los Angeles Soap Co.*, 83 F. 2d 875, 887-889; *The Niagara* v. *Cordes*, 62 U. S. 7 (16 L. ed. pp. 41, 47-50); *Chouteaux* v. *Leach & Co.*, 18 Pa. State Rep. 224; *Bird* v. *Cromwell*, 1 Mo. Rep. 58.

A well considered opinion which elucidates the distinction between a case calling merely for application of the general damage rule, and one in which the rule requiring

mitigation of damage comes into play, was *Seaman* v. *The Crescent City*, Case No. 12,581, 21 Fed. Cases 914. In that case a cargo of flour in barrels had been submerged in water for several hours because of a collision between the carrying vessel and steamer. The flour in its damaged condition could have been taken from the place of collision to Cincinnati, a distance of about 60 miles, where, as the Court found, a ready market existed for flour damaged by water, especially for use in making starch. Instead of doing this, the carrying vessel, acting for the cargo owner, after repairs had been made to her, proceeded with the wet flour to New Orleans where the flour was sold. The cargo owner asked to be made whole for the loss sustained measured by the price obtained at New Orleans. Objection was made, however, to such a recovery by the steamer because the cargo owner could have minimized his loss by sending the damaged flour to Cincinnati, where a higher price could have been obtained. In sustaining this objection, the Court, in a well considered opinion, recognized that the measure of damages which this Court laid down in *Smith* v. *Condry*, *supra*, was the correct general principle but, the Court went on to point out, that this principle is qualified by the equally well-settled doctrine that one whose property has been negligently damaged must take reasonable steps to mitigate damages.

POINT II

In applying the doctrine requiring mitigation of damage, petitioners adduced evidence before the Commissioner, clearly demonstrating that the sunken wheat could have been raised, transported for drying at New York, and sold there as animal feed for a price that would have yielded some $40,000.00 above the expense involved in such a salvage undertaking.

The evidence concerning the statement in this point heading is summarized in the petition at pages 8 and 9. No evidence was offered to contradict this proof. Respondent's witness, Horn, conceded that a feed price could have been obtained. Admittedly, Mr. Horn did not ascertain what the feed price was. He contented himself with opining that salvage would have been a gamble. He failed, however, to point out any *facts* on which this opinion rested, other than the cost of getting the wheat out of the boats and the boats out of the channel, which he estimated at $12,000.00. This estimate was within reasonable bounds, as petitioners' experts agreed. The real question was how much could have been realized for the wheat if it had been dried and sold for animal feed. The evidence adduced by petitioners, which was not challenged in any way, demonstrated that enough could have been realized so that approximately $40,000.00 would have remained after deducting the estimated $12,000.00 expense involved. There was nothing in the record before the Courts below to negative the fact findings of the Commissioner which rest on that evidence.

The argument that the Army Engineers would have obstructed such a salvage attempt is mere sophistry. The fact is, as appears in the opposition brief, at page 4, that

such salvage was not undertaken because in Mr. Horn's judgment, expressed in a telegram to the Army Engineers abandoning the cargo, it would not have been "commercially expedient." But from the very beginning, Mr. Horn decided to consider only "the possibility of arranging for the sale of the damaged wheat, 'as is, where is' in the sunken barges" (Respondent's brief in opposition to the petition at p. 3). No one has ever contended that *wet wheat* commands a price rendering salvage worthwhile; the salvage value of wet wheat, as we demonstrated, is its sale as feed after drying, as any prudent trader knows.

POINT III

The Courts below did not apply the correct standard of judicial review under Admiralty Rule 43½.

The question which the petition raises is whether the Courts below misapprehended the scope of judicial review in reversing the Commissioner's findings. Respondent argues that the District Court's opinion, adopted by the Court of Appeals, was not "clearly erroneous." The fact remains, however, that on testimony which was uncontradicted, and in no way impugned, the Commissioner believed the witnesses produced by petitioners. The Courts below, we submit, departed from the correct standard of review because they were not warranted in rejecting the Commissioner's fact findings on that testimony, for the reasons set forth at pages 5 to 13 of the petition.

Respectfully submitted,

ROMAN BECK
Counsel for petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Tug ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. and BOUCHARD TRANSPORTATION CO., INC.,

Petitioners,

—against—

CARGILL, .C.,

Respondent.

BRIEF ON BEHALF OF RESPONDENT CARGILL, INC., AND IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

HORACE T. ATKINS
Proctor for Respondent
70 Pine Street
New York 5, N. Y.

INDEX

PAGE

Statement 1

Facts 2

Cost of Clearing the Channel 5

The Decision of the District Judge on Damages 7

Questions Involved 9

ARGUMENT 10

POINT I

The District Court's opinion was not "clearly erroneous" 10

POINT II

The cargo owner acted reasonably in not undertaking the expense involved in salvage operations 12

POINT III

The cargo owner was not required to transport wet wheat, "admittedly unfit for human consumption," to New York City, and there condition it into "feed wheat" for the New York City market in an endeavor to minimize damages, as Albany was the port of destination, and as the Army Engineers in Albany, acting for the Secretary of War, had taken possession of the sunken barges and also the submerged wheat in the barges, in order to clear the channel, pursuant to statutory authority already quoted herein 14

CONCLUSION 16

TABLE OF CASES CITED:

PAGE

Navigazione Libera Triestina Societa Anonima v. Newtown Creek Towing Co., 98 Fed. (2d) 694, 696 11

Smith v. Condry, 42 U. S. 28 8

Standard Marine Insurance Co. Ltd. v. Scottish Metropolitan Assurance Co., 283 U. S. 284; 75 L. Ed. 284 .. 12

The Baltimore v. Rowland, 75 U. S. (8 Wall.) 377 13

The City of New York, 23 Fed. 616 8

The Scotland, 105 U. S. 24 ..... 12, 15

The Umbria (C. C. A., 2d Cir.), 59 Fed. 489 15

Other Authority Cited:

Summary Removal of Water Craft Obstructing Navigation, §415 (Title 33 U. S. C.; 30 Statutes at Large 1154; Act of March 3, 1899, Chapter 425, Section 20) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Tug ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. and BOUCHARD TRANSPORTATION CO., INC.,

Petitioners,

—against—

CARGILL, INC.,

Respondent.

BRIEF ON BEHALF OF RESPONDENT CARGILL, INC., AND IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statement

This brief is submitted in opposition to a petition for a writ of certiorari by Tug ELLEN S. BOUCHARD, Motor Tug ELLEN S. BOUCHARD, Inc., and Bouchard Transportation Co., Inc., petitioners, to review a *Per Curiam* Opinion of the United States Court of Appeals for the Second Circuit affirming "on Judge Foley's Opinion, filed June 4, 1957," a Final Decree in Admiralty (RA 71)* entered upon an Order of the United States District Court for the Northern District of New York which reversed the Findings and Conclusions of the Commissioner appointed by the District Court to ascertain and compute the amount of damages sustained by respondent herein, resulting from

* "PA" refers to Petitioner's Appendix in the Court of Appeals; "RA" refers to Respondent's Appendix in that Court.

the sinking of two canal barges with their respective cargoes of wheat, totaling 37,500 bushels, following a collision in the Hudson River near Albany, New York, on September 25, 1953.

Facts

The facts are fully set forth in the Opinion of the District Court (PA 90a-97a) reported in 1957 American Maritime Cases 1563, but not officially reported. The report of the Commissioner (PA 73a-89a) is not officially reported.

A synopsis of occurrences and dates pertinent to this petition may be stated chronologically as follows:

—— Friday, September 25, 1953

At 2:20 A. M. Collision occurred in the Hudson River adjacent to Albany, resulting in the sinking of the barge MARION O'NEILL with her cargo of 18,500 bushels of wheat, and the barge MAE LOWERY with her cargo of 19,000 bushels of wheat. (Opinion, Appellants' Appendix, 54a, fol. 179.)

At 4:00 A. M. Tug Kehoe, proceeding down river, collided with sunken barge MAE LOWERY. (Opinion, Appellants' Appendix, 55a, fol. 179.)

At 5:26 A. M. Owner Lowery abandoned the barges to the Government (66a).

U. S. Army Engineers at Albany determined sunken craft interfered with and endangered navigation, and considered blowing up the barges immediately to clear the navigable waters of the obstruction thereby caused (17a).

About 9:00 A. M. Inland Survey Bureau, Inc., marine surveyors engaged by marine underwriters "for the pur-

pose of ascertaining if it was possible to economically salvage the cargo" (14a).

About 9:00 A.M. Melville J. Horn, President of Inland Survey Bureau, Inc., dispatched Mr. Hylind, an employee of Inland Survey Bureau, Inc., to Albany to investigate the situation, and the possibility of arranging for the sale of the damaged wheat, "as is, where is," in the sunken barges. (Appellants' Appendix, 12a, fol. 26.)

About 9:00 A.M. Captain Westerfield, in charge of the U. S. Army Engineers in New York, telephoned Mr. Horn and asked, "What are you going to do with the cargo at Albany; *because the wrecks are a menace to navigation?*" (16a, 17a)

Saturday, September 26, 1953

Horn discussed the matter of clamming out what wheat remained in the barges with a marine surveyor, Connie Ezmark. Horn and Ezmark estimated it would cost not less than $12,000 in the way of hiring equipment to salvage the cargo. *If salvage of cargo was undertaken, the U. S. Army Engineers would have required the salvor of cargo also to remove the wrecks from the channel and dispose of the wrecks, all at the expense of such salvor.* Connie Ezmark, a salvor and interested in barges, would not undertake the salvage job, as he had examined the situation and did not consider the barges worth the expense of salving them (22a). (Appellants' Appendix, 15a.)

Monday, September 28, 1953

At 11:43 A.M. Inland Survey Bureau, Inc. sent the following telegram to Ambrose F. Brennan, Engineer in Charge, U. S. Army Engineers, Albany (Record, 55):

"Re barges MARION O'NEILL and MAE LOWERY sank Albany. Based on our investigation we have con-

cluded that it is not commercially expedient to enter upon any salvage operations with respect to the cargoes on each of the barges and therefore on authority of cargo underwriters we are taking no further steps to enter upon any attempted salvage operation with respect to these cargoes. Thanks for your fine co-operation and patient consideration."

Tuesday, September 29, 1953

The Army Engineers, after giving notice that sealed bids would be received, opened the following bids: from Cargo Recovery Corporation, 10¢ per bushel; from Millhurst Mills a bid of 10¢ per bushel; from Universal Grain Company a bid of $2,945 on the assumption that 19,000 bushels of wet wheat would be salved from the barges and loaded by the Army Engineers at Albany on scows furnished by Universal Grain Company (62a, 63a).

The bid of Universal Grain Company was accepted. (Appellants' Appendix, 44a.)

Although a total of 29,555 bushels were clammed out of the wrecks by the Government and placed on Government scows, 11,555 bushels of such quantity were dumped. The balance, or total quantity of wet wheat recovered, namely 18,400 bushels, was placed by the Army Engineers on scows furnished by the buyers, Universal Grain Company (55a, 56a).

U. S. Army Engineers commenced work of clearing channel of barge MARION O'NEILL on Tuesday, September 29th. (Appellants' Appendix, 43a.)

Sunday, October 4, 1953

Barge MARION O'NEILL was moved out of channel to the east shore of the river by the U. S. Army Engineers. (Appellants' Appendix, 43a.)

Monday, October 5, 1953

Commenced work of clearing the channel of the barge MAE LOWERY. (Appellants' Appendix, 43a.)

Friday, October 9, 1953

Barge MAE LOWERY moved out of the channel to the east shore of the river. (Appellants' Appendix, 43a.)

Friday, October 23, 1953

Government received bids for removal of the wrecks from Rensselaer shore and their disposal as follows: R. J. Campbell offered to remove the wrecks and dispose of them for the sum of $8,200. Merritt-Chapman & Scott Corporation would undertake same work if paid $9,774. Connie Ezmark (Island Marine Contracting Corporation) would undertake the same work if paid $7,771. (Appellants' Appendix, 48a.)

Island Marine Contracting Corporation was awarded the contract (65a).

The Cost of Clearing the Channel

The cost, based on the Government's accounting, to remove the wrecks and clear the channel, and incidentally salvage some 18,400 bushels of wet and swollen grain, which had become unfit for human consumption, amounted to $9,980.43. To such sum should be added the price which the Government paid to remove the wrecks from the Rensselaer shore and destroy them. This latter expense amounted to $7,771. Thus the total cost to the Government of clearing the channel and disposing of the wrecks amounted to $17,751.43. The amount derived from the sale by the U. S. Army Engineers of the damaged grain was $2,945. Hence the collision and its consequences cost the Government the sum of $14,806.43 (64a, 65a).

The authority of the U. S. Army Engineers summarily to remove the wrecks, and to sell that part of the cargo which was not completely lost, is in virtue of the Act of March 3, 1899, Chapter 425, Section 20; 30 Statutes At Large 1154; Title 33, Navigation and Navigable Waters, United States Code Annotated, Section 415.

We quote Section 415 of Title 33, United States Code Annotated:

"§415. SUMMARY REMOVAL OF WATER CRAFT OBSTRUCTING NAVIGATION.

Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in the foregoing section, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of War, or any agent of the United States to whom the Secretary may delegate proper authority, *the Secretary of War or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused,* using his best judgment to prevent any unnecessary injury; *and no one shall interfere with or prevent such removal or destruction: Provided,* That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: And provided further, *That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States*

for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States. (Mar. 3, 1899, c. 425, §20, 30 Stat. 1154.)" (Emphasis supplied.)

The Decision of the District Judge on Damages

On the facts above stated, some of which appear in the record of the trial, and some of which appear in testimony before the Commissioner, Judge Foley decided that the conclusion was "inescapable that the established rule as to the duty to minimize was too harshly and narrowly interpreted (by the Commissioner) without due regard to the actualities and realities of the situation present at and shortly after the collision." (Appellants' Appendix, 92a, fol. 232.)

In its Decision on damages, the District Court observed: (Appellants' Appendix, 95a, fol. 235.)

> "Most vital of all to justify the estimate of Horn that it would cost $12,000.00 is the fact it actually cost the Army Engineers $17,751.43 for the entire operation. The wheat sold by the Army only obtained $2,945.00. It is interesting to note that the private bids requested by Inland were only slightly below the amount which was received by the Army Engineers after competitive bidding pursuant to the Statute. This net actual expenditure of $14,806.43 cannot be laughed off as government bookkeeping or the result of a 'give-away' based merely upon innuendo without basis in fact. To corroborate further the intelligence and competency of Inland, the hulls were salvaged by

> Connie Ezmark's firm, the man Inland originally contacted on the whole problem. Again, this contract was awarded after competitive bidding."

The District Judge held, and we submit correctly held, citing *Smith* v. *Condry*, 42 U. S. 28, and *The City of New York*, 23 Fed. 616, that the proper measure of damages was the damage sustained by libellant-appellee *at the time and place of injury*. (Appellants' Appendix, 96a, fol. 235.) He also observed that the holding by the Commissioner that libellant-appellee should transport the wheat to the New York City market (*Albany was the destination*) again accentuated the extreme burden sought to be placed by a tortfeasor on an innocent party. (Appellants' Appendix, 96a, fol. 235.)

Judge Foley also observed: (Appellants' Appendix, 96a, fol. 236.)

> "There is not one fact I can find to support the exaggerated and speculative inference urged by Bouchard that someone obtained a tremendous bonanza from the purchase of this wet and damaged wheat. The combined experience and competence of Inland Survey and the Army Engineers in the ordinary course of their business are the best answer to such unproven speculation."

As libellant-appellee and respondent-appellant had stipulated that the value of the wheat immediately prior to the collision was $2.00 per bushel, and as the District Judge held that the collision resulted in a total loss of the wheat on both barges, damages were awarded to libellant in the amount of $75,000., plus the expenditure of $527.67 for the services of Inland Survey Bureau, Inc., for a total award of $75,527.67, with interest and costs.

Questions Involved

The questions presented, we submit, involve only questions of fact, and may be stated as follows:

1. Whether the determination of the sum of damages by the District Court was "clearly erroneous";

2. Whether the cargo owner acted reasonably under the circumstances in not undertaking the risk and expense involved in salvage operations;

3. Whether the cargo owner was required to transport wet wheat, "admittedly unfit for human consumption," to New York City, and there condition it into "feed wheat" for the New York City market in a highly speculative endeavor to minimize damages, notwithstanding Albany was the port of destination, and notwithstanding the Army Engineers in Albany, acting for the Secretary of War, had taken possession of the sunken barges and the submerged wheat in the barges, in order to clear the channel, pursuant to statutory authority already quoted herein.

ARGUMENT

POINT I

The District Court's opinion was not "clearly erroneous."

The District Court recognized the application of the "clearly erroneous" doctrine in sustaining the exceptions of libellant-appellee (respondent herein). Notwithstanding such doctrine, the District Court after due consideration based on oral arguments, on briefs, and on a review of the testimony, held that libellant's exceptions should be sustained and granted, and thereafter computed the damages and entered a final decree on such computation. We submit the decision and final decree of the District Court should not be set aside, unless this Court is of opinion that the decision and final decree of the District Court was "clearly erroneous."

We submit the decision of the District Court was not "clearly erroneous," but fully justified on the evidence that the cost of salvage proved to be $17,751.43, and that the proceeds of sale of the quantity of wet wheat clammed from the wrecks and landed on the purchaser's scows amounted to but $2,945.

Respondent herein proved conclusively, we submit, that if it had conducted operations to salvage what wet wheat remained in the wrecks, and, being unfit for human consumption, had incurred the expense of drying the wheat, and had assumed the risk and expense of transporting the wheat to New York City, and had endeavored to market it as "feed wheat," the result would be a case of increasing, rather than of minimizing the damages, a case of throwing good money after bad. "The proof of the pudding is the

eating." Petitioners should be thankful that respondent did not endeavor to minimize damages after receiving Horn's recommendation not to incur the additional expense of conducting salvage operations.

As the appeal stands before this Court, we submit this appeal should be adjudged as if the District Court itself had computed the damages in the first instance, and had not referred the computation to a Commissioner.

In support of our submission, we quote from the language used by Judge Learned Hand, speaking for the Court of Appeals, Second Circuit, in the case of *Navigazione Libera Triestine Societa Anonima* v. *Newtown Creek Towing Co.*, 98 Fed. (2d) 694, 696:

> "The claimant strongly presses upon us that we should treat his finding as 'presumptively correct' (Admiralty Rule 43½, 28 U. S. C. A. following section 723) and so we must; but it is 'subject to review,' and we 'reject' it because, like the district judge, we are 'fully satisfied that error has been committed.' However well Gebauhr may have appeared, he was willing to say that the loss of a tip of twenty inches from one of the flukes did not make the ship unseaworthy; all the other witnesses disagreed with that, including Bagger, the claimant's other expert. It is true that we should not disturb a verdict supported by his testimony, little as we might agree with it; *but the finding of a commissioner has no such immunity; in the end we are responsible as well for the facts as for the law*, and upon an issue where the testimony was so unevenly weighted we cannot accept a finding based upon the impression made by one witness even though the commissioner—mistakenly supposing that this added force to his finding—assured us how persuasive he found him. We

think that the judge was therefore right in holding that twenty inches had been broken off, and that this made the ship unseaworthy." (Emphasis supplied.)

POINT II

The cargo owner acted reasonably in not undertaking the expense involved in salvage operations.

The law applicable is that damages are computed on the basis of the value of the cargo at the time and place of collision, subject to the limitation that the cargo owner must exercise reasonable diligence, under the circumstances of the case, not only not to increase the damages, but in the exercise of reasonable diligence to reduce the damages. That such was the law of the case was advanced by proctors for petitioners, accepted as correct by proctors for respondent herein, and applied by the District Court.

Thus in the leading case of *The Scotland*, 105 U. S. 24; 26 L. Ed. 1001, the rule was stated as follows:

> "The rule is, the prime cost or market value of the cargo at the place of shipment, with all charges of lading and transportation, including insurance and interest; but without any allowance for anticipated profits."

And in the case of *Standard Marine Insurance Co. Ltd. v. Scottish Metropolitan Assurance Co.*, 283 U. S. 284; 75 L. Ed. 284, the rule of computing damages to cargo lost at sea in collision cases was stated as follows:

> "It has long been the accepted rule, in the law of maritime torts and of maritime insurance, that the recoverable value of cargo lost or damaged at sea is that at time and place of shipment, without allowance for increase of value or anticipated profits. Smith v. Condry, 1 How. 28, 35, 11 L. ed. 35, 37; The Vaughan

(The Telegraph v. Gordon) supra (14 Wall. 267, 268, 20 L. ed. 808, 809); The Scotland (National Steam Nav. Co. v. Dyer), 105 U. S. 24, 35, 26 L. ed. 1001, 1005; The Aleppo (D. C.) 7 Ben. 120, Fed. Cas. No. 158; The Umbria (D. C.) 59 Fed. 489, 490; Phillips, Ins. §§1226, 1229; 1 Arnould, Marine Ins. 11th ed. §365; see The Old Reliable (C. C. A. 2d) 262 Fed. 108, 110; Guibert v. The George Bell (D. C.) 5 Hughes, 172, 3 Fed. 581, 584, 585. The cargo is placed at risk when the voyage begins. Its value then is the measure of the risk and of the loss suffered if the cargo is lost or damaged on the voyage. Market value at destination on the date of the loss is not the measure, for that was not its value at the place of loss. To attribute to the cargo the market value at destination is to measure, not the loss, but the profits which would have accrued if the voyage had been completed, and if the market price at the time of loss had continued to be the market price at the time of arrival."

Proctors for petitioner refer to the decision of this Court in *The Baltimore* v. *Rowland*, 75 U. S. (8 Wall.) 377, urging the case at bar is in conflict with such decision. We submit the decision of *The Baltimore, supra*, not only is not in conflict with the submissions of respondent herein, but that such decision supports respondent's position.

The instant case involves a perishable cargo, namely wheat. *The Baltimore, supra*, involved a non-perishable cargo, namely coal. That this Court recognized in *The Baltimore* case, *supra*, the distinction between perishable cargo and cargo not perishable, clearly appears in the language of Mr. Justice Clifford at pages 386, 387, of the opinion. We quote:

"Experience shows that in many cases where the injured vessel is sunk, especially when the disaster

happens in rivers or harbors, the vessel may be raised at moderate expense, and that the cargo, *if not perishable,* may be restored to the shipper, *or carrier forward to the port of destination,* and the rule in such cases is to award such damages only as will compensate the owners for the loss incurred, which is held to include the expense of raising the vessel and putting her in repair, with a proper allowance for the loss of freight *and for the damage to the cargo,* and for the detention of the vessel during the time necessary to make the repairs and fit the vessel to resume her voyage." (Emphasis supplied.)

POINT III

The cargo owner was not required to transport wet wheat, "admittedly unfit for human consumption," to New York City, and there condition it into "feed wheat" for the New York City market in an endeavor to minimize damages, as Albany was the port of destination, and as the Army Engineers in Albany, acting for the Secretary of War, had taken possession of the sunken barges and also the submerged wheat in the barges, in order to clear the channel, pursuant to statutory authority already quoted herein.

Respondent cargo owner was not required, we submit, to transport wet wheat unfit for human consumption, from the point of destination of the voyage on which the collision occurred, namely Albany, to New York City, and there condition and market the wheat as feed wheat in an endeavor to minimize damages, particularly as the probabilities at the time were that such course would increase rather than decrease the damages.

The rule of damages in a collision case is based on "the prime cost or market value of the cargo at the place of shipment, with all charges of loading and transportation, including insurance and interest; but without any allowance for anticipated profits," which adds up to its value at the time and place of the loss. *The Scotland*, 105 U. S. 24. If damaged cargo is carried to destination (in the instant case Albany), "the correct rule of damages is to allow the difference between the market value of the goods if uninjured and their value in their damaged condition." *The Umbria* (C. C. A., 2d Cir.), 59 Fed. 489.

The District Court recognized this rule, stating (Appellants' Appendix, 95a, fol. 235):

> "There is nothing between the testimony of DeMars, a hull surveyor, and the two alleged experts from New York, one a dairy farmer, in the effort to establish the value of animal feed in the New York market. Even if such evidence were reliable and in closer harmony with reality, it is questionable whether the New York City value would legally be the proper market for the ascertainment of value in this case."

CONCLUSION

We submit this petition invloves only questions of fact, the issue being whether respondent herein did what was legally required under the circumstances to minimize the loss. The District Court decided this issue in favor of respondent herein. The Court of Appeals affirmed on the Opinion of the District Judge.

We submit the petition for a writ of certiorari should be denied.

Respectfully submitted,

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